NOT YET SCHEDULED FOR ORAL ARGUMENT

United States Court of Appeals for the District of Columbia Circuit

No. 18-1092
(Consolidated with 18-1156, 18-1228)

DIRECTSAT USA, LLC,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner.

(For Continuation of Caption See Inside Cover)

On Petition for Review and Cross-Application for Enforcement from an Order of the National Labor Relations Board in NLRB No. 13-CA-176621

DEFERED JOINT APPENDIX

PETER B. ROBB
General Counsel
JOHN W. KYLE
Deputy General Counsel
LINDA DREEBEN
Deputy Associate General Counsel
USHA DHEENAN
Supervisory Attorney
GREGOIRE SAUTER
Attorney
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, DC 20570
Tel.: (202) 273-2948
Fax: (202) 273-1714

Attorneys for Respondent

ERIC P. SIMON
DANIEL D. SCHUDROFF
DOUGLAS J. KLEIN
JACKSON LEWIS P.C.
666 Third Avenue, 29th Floor
New York, New York 10017
Tel.: (212) 545-4000
Fax: (212) 972-3213
eric.simon@jacksonlewis.com
daniel.schudroff@jacksonlewis.com
douglas.klein@jacksonlewis.com

Attorneys for Petitioner DirectSat USA LLC

(For Continuation of Appearances See Inside Cover)

January 18, 2019

ARTHUR TRACY CARTER
ARRISSA K. MEYER
LITTLER MENDELSON, P.C.
2001 Ross Avenue,
Suite 1500, Lock Box 116
Dallas, Texas 75201
Tel.: (214) 880-8100
Fax: (214) 880-0181
atcarter@littler.com

STEPHEN J. SFERRA
LITTLER MENDELSON, P.C.
1100 Superior Avenue, 20th Floor
Cleveland, Ohio 44114
Tel.: (216) 696-7600
Fax: (216) 696-2038
ssferra@littler.com

A. JOHN HARPER III
LITTLER MENDELSON, P.C.
1301 McKinney Street, Suite 1900
Houston, Texas 77010
Tel.: (713) 951-4000
Fax: (713) 951-9212
ajharper@littler.com

Attorneys for Petitioner DirectTV, LLC

DIRECTV, LLC,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

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United States Government

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, DC 20570-0001

July 31, 2018

Mark J. Langer, Clerk
United States Court of Appeals
for the District of Columbia Circuit
E. Barrett Prettyman U.S. Courthouse
333 Constitution Avenue, NW, Room 5423
Washington, DC 20001-2866

Re: *DirectSat USA, LLC v. NLRB*
D.C. Cir. Nos. 18-1092 & 18-1156
Board Case No. 13-CA-176621

Dear Mr. Langer:

I am transmitting the Certified List of the contents of the Agency Record in the above-captioned case.

Very truly yours,

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, DC 20570-0001
(202) 273-2960

Encls.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DIRECTSAT USA, LLC	)	
	)	Nos. 18-1092 & 18-1156
Petitioner/Cross-Respondent	)	
	)	
v.	)	Board Case No.
	)	13-CA-176621
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	

CERTIFIED LIST OF THE NATIONAL LABOR RELATIONS BOARD

Pursuant to authority delegated in Section 102.115 of the National Labor Relations Board's Rules and Regulations, 29 C.F.R. § 102.115, I certify that the list below fully describes all papers and documents, which constitute the record before the Board in DirectSat USA, LLC, Case No. 13-CA-176621.

Farah Z. Qureshi
Associate Executive Secretary
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, DC 20570-0001
(202) 273-2960

July 31st, 2018

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UNITED STATES COURT OF APPEALS
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	)	
v.	)	Board Case No.
	)	13-CA-176621
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	

CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I certify that the foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system.

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, DC 20570-0001

Dated at Washington, DC
this 31st day of July, 2018

FORM EXEMPT UNDER 44 U.S.C 3512

INTERNET FORM NLRB-501 (2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case	Date Filed
13-CA-176621	5/20/16

INSTRUCTIONS:
File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
DirectSat USA

b. Tel. No. 267.464.2783

c. Cell No.

f. Fax No. 610-337-8051

g. e-Mail
ldudley@unitekgs.com

h. Number of workers employed
Approx. 45

d. Address *(Street, city, state, and ZIP code)*
479 Shoemaker Road, Suite 106
King of Prussia, PA 19406

e. Employer Representative
Lauren Dudley
Human Resources Director

i. Type of Establishment *(factory, mine, wholesaler, etc.)*
Video Services Provider

j. Identify principal product or service
Satellite TV

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and *(list subsections)* 8(a)(5) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge *(set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)*

Since on or about May 19, 2016 the employer has refused to provide the Union a full copy of the contract between DirectSat and DirecTV in connection with the negotiations with the first collective bargaining agreement between the parties.

3. Full name of party filing charge *(if labor organization, give full name, including local name and number)*
IBEW Local Union 21

4a. Address *(Street and number, city, state, and ZIP code)*
1307 W Butterfield Rd., Suite 422
Downers Grove, IL 60515

4b. Tel. No. 630 960-4466 ext 449

4c. Cell No. 630 222-9121

4d. Fax No. 630 960-9607

4e. e-Mail
dwebster@ibew21.org

5. Full name of national or international labor organization of which it is an affiliate or constituent unit *(to be filled in when charge is filed by a labor organization)*
International Brotherhood of Electrical Workers

6. DECLARATION
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By David E Webster
(signature of representative or person making charge) *(Print/type name and title or office, if any)*

Address 1307 Butterfield Rd., Suite 422 Downers Grove, IL 60515

5/20/16
(date)

Tel. No. 630 222-9121

Office, if any, Cell No. 630 960-4466 ext 449

Fax No. 630 960-9607

e-Mail
dwebster@ibew21.org

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

FIRST AMENDED

FORM EXEMPT UNDER 44 U.S.C 3512

INTERNET FORM NLRB-501 (2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case	Date Filed
13-CA-176621	5/20/16

INSTRUCTIONS:
File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
DirectSat USA

b. Tel. No. 267-464-1783-

c. Cell No.

f. Fax No. 6103378051

d. Address *(Street, city, state, and ZIP code)*
479 Shoemaker Road, Suite 106
King of Prussia, PA 19406

e. Employer Representative
Lauren Dudley
Human Resources Director

g. e-Mail
ldudley@unitekgs.com

h. Number of workers employed
Approx. 45

i. Type of Establishment *(factory, mine, wholesaler, etc.)*
Video Services Provider

j. Identify principal product or service
Satellite TV

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and *(list subsections)* 8(a)(5) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge *(set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)*
Since on or about May 19, 2016 the employer has refused to provide the Union a full copy of the contract between DirectSat USA and DirecTV in connection with the negotiations with the first collective bargaining agreement between the parties. In addition, since on or about May 19, 2016 the employer has refused to provide the Union all current agreements with sub contractors.

3. Full name of party filing charge *(if labor organization, give full name, including local name and number)*
IBEW Local Union 21

4a. Address *(Street and number, city, state, and ZIP code)*
1301 W Butterfield Rd., Suite 422
Downers Grove, IL 60515

4b. Tel. No. 630 960-4466 xt 449

4c. Cell No. 630 222-9121

4d. Fax No. 630 960-9607

4e. e-Mail
dwebster@ibew21.org

5. Full name of national or international labor organization of which it is an affiliate or constituent unit *(to be filled in when charge is filed by a labor organization)*
International Brotherhood of Electrical Workers, AFL-CIO

6. DECLARATION
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By David E Webster DAVID E WEBSTER BUS. REP
(signature of representative or person making charge) *(Print/type name and title or office, if any)*

Address 1307 W Butterfield Rd. Suite 422, Downers Grove, IL 60515

6/10/16
(date)

Tel. No. 630 222-9121

Office, if any, Cell No. 630 960-4466xt 449

Fax No. 630 960-9607

e-Mail
dwebster@ibew21.org

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CORNFIELD AND FELDMAN LLP
ATTORNEYS AND COUNSELORS
25 EAST WASHINGTON STREET
SUITE 1400
CHICAGO, ILLINOIS 60602-1803
(312) 236-7800 FAX (312) 236-6686
1-800-621-3821

J. DALE BERRY
GILBERT A. CORNFIELD
GILBERT FELDMAN
JACOB POMERANZ (CA)
ROBERT A. SELTZER (DC)
JIM M. VAINIKOS

PAMELA LAMBOS
GAIL E. MROZOWSKI
ELISA REDISH
MARK S. STEIN
MICHAEL S. YOUNG

ARNOLD E. CHARNIN
(1933-1978)
LINZEY D. JONES
(1922-2005)

June 14, 2016

Kevin McCormick, Board Agent
National Labor Relations Board
Region 13
219 South Dearborn Street
Suite 808
Chicago, IL 60604

Re: DirectSat USA and IBEW Local Union 21
Case No. 13-CA-176621
POSITION STATEMENT IN SUPPORT OF ULP

Dear Sir:

The following is a position statement in support of the subject unfair labor practice charge filed by Local #21, IBEW.

The Amended Charge requests that the NLRB find that the Employer, DirectSat, is in violation of Section 8(a)(5) by failing and refusing to provide the charging Union with copies of DirectSat's agreement with Direct TV and agreements between DirectSat covering contracted technicians performing bargaining unit work functions as assigned through the Employer's South Holland, Illinois location.

The Union requires the requested documents in connection with the Union's efforts to achieve a first collective bargaining agreement with the Employer for the certified bargaining unit of technicians working out of the South Holland location. The NLRB has long recognized that the good faith bargaining obligation of Section 8(a)(5) requires that an employer upon request supply a union as the bargaining representative with information in order for the union to engage in effective bargaining. *S. I. Allen & Co*, 1 NLRB 714 (1936); *Industrial Welding Co.*, 175 NLRB 477 (1969); *Oregon Coast Operators Ass'n*, 113 NLRB 1338 (1955), aff'd 246 F 2d 280; and *Southern Saddlery Co.* 90 NLRB 1205 (1950)

The following summary of the evidence submitted by the Union supports the Union's charge:

1 The Union is the certified bargaining representative for technicians employed by the Employer assigned to the South Holland location.

2 Since the Union was certified by the NLRB in 2014, the Union has been unable to achieve a collective bargaining agreement with the Employer.

3 The technicians working for the Employer are exclusively engaged in installing and maintaining DirecTV services within a geographic area serviced by the South Holland operation.

4 After the Union was certified by the NLRB, AT&T purchased DirecTV Since the acquisition AT&T has assigned technicians who are part of Local 21's bargaining unit in Illinois and Northwest Indiana to providing DirecTV services in addition to DirecTV installation and maintenance performed by the South Holland technicians

5 Based upon information provided to the Union by the South Holland technicians and by investigation conducted by Union Business Representative David Webster, the Union has reasonable cause to believe that DirecTV (AT&T) has direct control over the training, assignments, working conditions and standards for the payment of wages to both the bargaining unit and contract technicians employed at the South Holland operation based upon piece work formulas

Therefore, the Union requires the requested documents for the following reasons

1 To obtain knowledge of the method by which the bargaining unit employees and contract technicians are paid.

2 To determine the extent of control by DirecTV (AT&T) over the hours, wages and working conditions of the bargaining unit technicians and contract technicians

3 And, thereby, to determine whether DirecTV (AT&T) is a joint employer for the purpose of collective bargaining

4 And to determine whether the contract technicians are actually functioning as employees of DirectSat and DirecTV and therefore should be accreted to the Union's bargaining unit

5 And possibly to determine whether the DirectSat employees and the AT&T technicians have been sufficiently integrated by AT&T that they should be accreted to the existing Local 21-AT&T bargaining unit

It is important for the Union to underscore that at this point we are not seeking the NLRB to make a determination whether DirectSat and DirecTV (AT&T) are joint employers or that the contract technicians are DirectSat employees within the meaning of the Act The Union is only requesting access to the full DirectSat-DirecTV contract and the agreements with the contract technicians so that the Union can understand the extent to which DirecTV (AT&T) controls the employment of the South Holland technicians

Respectfully submitted,

CORNFIELD AND FELDMAN LLP

Gilbert A. Cornfield

GAC/saf

cc: Dave Webster, IBEW 21

Representing Management Exclusively in Workplace Law and Related Litigation

jackson lewis
Attorneys at Law

Jackson Lewis P.C.
666 Third Avenue
New York, New York 10017
Tel 212 545-4000
Fax 212 972-3213
www.jacksonlewis.com

ALBANY, NY	GREENVILLE, SC	MONMOUTH COUNTY, NJ	RALEIGH, NC
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DETROIT, MI	MILWAUKEE, WI	PROVIDENCE, RI	WHITE PLAINS, NY
GRAND RAPIDS, MI	MINNEAPOLIS, MN		

*through an affiliation with Jackson Lewis P.C., a Law Corporation

MY DIRECT DIAL IS: 212-545-4014
MY EMAIL ADDRESS IS: SIMONE@JACKSONLEWIS.COM

August 2, 2016

E-FILE
Kevin McCormick, Esq.
NLRB, Region 13
219 South Dearborn, Room 808
Chicago, IL 60604

Re: DirectSat USA
Case No. 13-CA-176621

Dear Mr. McCormick:

We are counsel to DirectSat USA ("DirectSat") in this matter. We submit the following in support of DirectSat's position that its refusal to provide IBEW Local 21 (the "Union") with the entire Home Services Provider agreement between DirectSat and DirecTV, Inc. ("DirecTV") and DirectSat's agreements with its subcontractors did not violate Section 8(a)(5). The Union's allegations are meritless and the charge should be dismissed in its entirety.

I. BACKGROUND

A. The Business of DirectSat

DirectSat installs and services satellite television equipment for DirecTV. DirectSat operates offices in what is referred to as the Chicago Designated Market Area, including a facility in South Holland, Illinois.[1] DirectSat provides these services pursuant to a Home Service Provider ("HSP") agreement with DirecTV.

B. Local 21 IBEW

On February 11, 2014, the Union was certified as the exclusive bargaining representatives of all full-time and part-time installation and service technicians at the Mokena facility. DirectSat and the Union have been negotiating a first contract since August 2014.

[1] The South Holland facility relocated from Mokena, Illinois in or about May 2015.

C. The Union's Requests For Information

Throughout negotiations, the Union has made several information requests, and DirectSat has routinely responded in good faith. For example, at the onset of negotiations in August 2014, in response to the Union's request for information, DirectSat provided the Union with the allocation of monthly costs between DirectSat employees and DirectSat for medical, dental and vision insurance and information regarding paid sick days. See Exhibit "A."

Over the course of negotiations, the Union has made a number of requests for portions of HSP agreement between DirectSat and DirecTV. The Union initially requested a copy of the HSP agreement between DirectSat and DirecTV by email dated November 23, 2015. See Exhibit "B." The purported justification for the request was "…one of the company's proposal references the HSP agreement with DTV. We'd like a copy of the agreement referenced in the proposal." DirectSat understood the request referred to DirectSat proposal No.78 dated November 4, 2015 entitled ***"New Product Lines" and which referenced the treatment of "products of services other than those provided pursuant to [DirectSat's] Home Service Provider agreement with DirecTV…"*** (emphasis in original). On December 4, 2015, DirectSat responded with those portions of the HSP agreement delineating services provided by DirectSat pursuant to the HSP agreement. See Exhibit "C."[2]

On March 18, 2016, the Union requested information on metrics established by DirecTV to measure the performance of DirectSat. See Exhibit "D." The basis for this request was the Employer's explanation during bargaining that, although not required to do so by its HSP agreement, in establishing performance metrics of technicians, it took its own performance standards into consideration. On April 6, 2016, DirectSat provided the Union with the metrics established by DirecTV to measure the performance of DirectSat. See Exhibit "E."

On May 19, 2016, the Union again requested a full copy of the HSP agreement as well as "current agreements with subcontractors." This time, however, the ostensible reason for the Union's request was "to evaluate the extent of control of DirectSat by DirecTV/AT&T." See Exhibit "F." DirectSat responded on May 23, 2016. DirectSat advised the Union that the request for the full copy of the HSP agreement to evaluate DirecTV's control over DirectSat was irrelevant to negotiations between DirectSat and the Union because DirecTV does not have any control over the wages paid to DirectSat's employees or the metrics used to evaluate the performance of bargaining unit employees, and these decisions are vested exclusively in the control of DirectSat. See Exhibit "G." On June 22, 2016, DirectSAT supplemented its response and advised the Union that, similarly, subcontractor agreements were not relevant to the Union's stated reason for requesting the subcontracts. See Exhibit "H." Indeed, DirectSat and the Union already reached a tentative agreement in negotiations on the use of subcontractors.

---

[2] On April 5, 2016, the Union again requested a full copy of the HSP agreement "particularly because of the referenced n[sic] the New Products Lines Proposal." Having already provided relevant information to the Union, DirectSat did not provide any further response.

II. ARGUMENT

A. DirectSat's HSP Agreement With DirecTV and DirectSat's Subcontracts Are Not Relevant

The duty to bargain under the Act includes the duty to provide information that is necessary for the union to perform its functions as representative of the bargaining unit, and information pertaining to mandatory subjects of bargaining is presumptively relevant to the union's role. See, e.g., Southern California Gas Co., 344 NLRB 231 (2005). Where, as here, a union requests information that does not involve the bargaining unit, there is no presumption of relevance. Rather, the union must establish the relevance and necessity of the information. Trim Corp., 349 NLRB 608 (2007) (information request concerning the existence of an alleged alter-ego operation is not presumptively relevant). Island Creek Coal, 292 NLRB 480, 490 fn. 19 (1989).

B. The Union Has Not Alleged A Joint Employer Relationship, its Explanation of Relevance Was Not Precise, and There is No Objective Basis for the Information Requested.

We are not aware of any assertion by the Union that DirectSat and DirecTV and/or DirectSat and its subcontractors are joint employers. The Union's latest stated reason for seeking the entire HSP agreement was "to evaluate the extent of control" of DirectSat by DirecTV but has offered no explanation as to how such request is relevant to any issue in negotiations.

Where the union requests information that does not involve the bargaining unit, the union's explanation of relevance must be made with some precision, as a generalized conclusory explanation is insufficient to trigger an obligation to supply information. Island Creek Coal, 292 NLRB 480, 490 fn. 19 (1989). Here, the Union's explanation of relevance was the antithesis of precision. Indeed, the Union changed its stated reason for why it was seeking the entire HSP agreement. The Union initially claimed it sought the entire HSP agreement because the agreement was referenced in DirectSat's New Products Lines Proposal. The Union offered no objection when DirectSat provided the *relevant* provisions of the HSP agreement. Nor did the Union object when in response to its request for the HSP agreement so it could analyze the performance metrics imposed on DirectSat, DirectSat provided only those provisions of the HSP agreement addressing the performance metrics. Then, in May 2016, the Union changed course and tried to justify its request for the entire HSP agreement so it could "evaluate the extent of control of DirectSat by DirecTV/AT&T." Of course the Union never offered any explanation as to why or how the suspected control of DirecTV over DirectSat was relevant to negotiations.

Given the lack of any cogent explanation from the Union for its request for the complete HSP agreement, DirectSat is left to speculate that the Union seeks to investigate whether a joint employer relationship exists between DirecTV and DirectSat under the standards established by the Board in Browning Ferris Industries of California, Inc., 362 NLRB No. 186 (August 27, 2015). Even assuming *arguendo* this is rationale for the Union's conduct, it is

insufficient as a matter of law to require DirectSAT to provide the HSP agreement. The Union must have a *reasonable objective factual basis* to seek the information requested. Piggly Wiggly Midwest LLC, 357 NLRB 2344 (2012). The Union certainly has not articulated any such reasonable objective factual basis warranting its demand for the HSP agreement. We are not aware of any cases, and to our knowledge the Union has not provided the Region with any cases, to support its position that it is entitled the entire HSP agreement and DirectSat's subcontracts on an alleged joint employer theory.[3] Our research shows the only case that comes remotely close is Cannelton Industries, Inc., 339 NLRB 996, 997 (2003), which arose in the context of a request for information based on a *single employer/alter ego* theory. However, in Cannelton, unlike here, the Union provided nine *specific objective* factors why they had reasonable belief that a single employer/alter ego relationship existed. Here the Union has not articulated, nor can it articulate, ***any*** objective factors to support a reasonable belief that DirectSat and DirecTV and/or DirectSat and its subcontractors are joint employers.

While the Board's standard for evaluating information requests is a broad discovery-type standard, the standard is not nonexistent. There must be some objective facts to establish a reasonable belief. See, e.g., Dodger Theatricals Holdings, 347 NLRB. 953, 967 (2006) (where the Board affirmed the ALJ's findings, and the ALJ stated: "I note that a number of Board cases, phrase the burden on unions in such cases as needing only to establish a 'reasonable belief' that the information is relevant, without adding the requirement that it must also be based on objective factors . . . However, an examination of the facts in these cases reveals the existence of such objective facts, in order to establish the Union's 'reasonable belief.' In my view, the added requirement of objective facts to establish 'reasonable belief' is meant to make clear that the union's belief cannot be construed as 'reasonable', where it is not based on objective facts, but rather, suspicion, surmise conjecture or speculation). Here, there are absolutely no objective facts the Union has or can point to which establish a reasonable belief of a joint employer relationship. DirectSat already explained to the Union at the bargaining table that DirecTV does not have any control over the wages paid to DirectSat's employees or the metrics used to evaluate the performance of bargaining unit employees. See Exhibit "D." These decisions are vested exclusively in the control of DirectSat.

III. CONCLUSION

For nearly two years DirectSat has bargained in good faith over the wages, hours and other terms and conditions of employment of unit employees and routinely provided the Union with information it requested related to bargaining. The Union's information request at issue has no apparent relationship to bargaining, and the Union has not provided any reasonable objective factual basis that the information it requested is even remotely relevant. The Union is simply engaged in a fishing expedition designed, we believe, to establish a bargaining obligation of another entity. That, however, is an issue between the Union and DirecTV alone.

[3] The Region advised us that the Union did not provide the Region with any case law to support its position that it is entitled to the entire HSP agreement or DirectSat's subcontracts. If the Union provides the Region with any case law it argues supports its position, DirectSat respectfully requests that the Region advise DirectSat of such case law, and DirectSat reserves it right to respond.

jackson lewis
Attorneys at Law

For all of the foregoing reasons, we respectfully submit the instant charge is without merit and should be dismissed in its entirety.

Very truly yours,

Jackson Lewis P.C.

Eric P. Simon
Douglas J. Klein

EXHIBIT A

MY DIRECT DIAL IS: (212) 545-4014
MY EMAIL ADDRESS IS: SIMONE@JACKSONLEWIS.COM

August 22, 2014

VIA FACSIMILE (630-960-9607) & U.S. MAIL

Mr. David Webster
Business Representative
Local 21, IBEW
1307 Butterfield Road, Suite 422
Downers Grove, Illinois 60515-5606

Re: DirectSat USA/Supplemental Response to Union's July 16, 2014 Information Request

Dear Mr. Webster:

In response to Paul T. Wright's July 16, 2014 letter requesting information regarding costs for DirectSat's benefit package, attached are the allocation of monthly costs between DirectSat employees and DirectSat for medical, dental, and vision insurance during the period September 1, 2012 to current. Also attached is DirectSat's policy as of January 1, 2014 regarding paid sick days

If you have additional questions, please do not hesitate to contact me.

Very truly yours,

JACKSON LEWIS P.C.

Eric Simon

Eric P. Simon

EPS/gb

EXHIBIT B

From: Dave Webster [mailto:dwebster@ibew21.org]
Sent: Monday, November 23, 2015 2:55 PM
To: Lauren Dudley <LDudley@unitekgs.com>
Subject: RE: Information Request

Lauren,

Thank you for the info. However, I've noticed that there are some missing names from the Tech Detail report. It looks like they are guys on disability or some sort of leave at the time this report was run, which leads me to a question on that report…what time period is the report for? I'm guessing it was for one day, but I didn't see a way to tell for sure. If so, which day? If not what time period?

The names missing from the report are Adams, Garza, Hickenbottom, Urbina, Carter, Conner & Griffith. I know about all of them but Adams & Hickenbottom being out on leave for a period of time and I think all of them except Carter, Conner and Griffith are back. Can you please run that report again (in a different time period) now that most have returned and if it IS only one day can you run a couple of days in different weeks so we can see the changes, please.

Also, can you send me info on the amount of money earned by each tech during the time period of the report you already sent and the reports that will be sent from the request above? We are trying to work on wages and this information is important to be able to come to an agreement that the techs can live with.
In addition, one of the company proposals references the HSP agreement with DTV. We'd like a copy of the agreement referenced in the proposal.

Also referenced in a proposal are performance standards utilized by the "Employers customer". We'd like to see the standards that DTV is asking you to meet. To be clear, not the metrics used by DSat derived *from* the standards set by the Employers customer, but the actual standards from DTV that DSat uses to form the scorecard metrics.

During bargaining Dan referenced a map with a radius for each tech. Can you provide an example (Map) that shows the radius of each tech and how it benefits the techs financially as per Dan?

In the Chicago South TOQ meeting Dan inadvertently showed a slide that talked about a bonus plan for senior techs (I believe it was for those with 10+ years) that is being rolled out in the market, but not in South Holland due to status Quo. Please provide info on that program so we can discuss.

Talking about status quo…I know you were looking for names of people that combine breaks & lunches to take a 60 minute lunch. The only names I have at the moment are Urbina and naturally Dillon. I believe that there are a few more, but haven't talked to them to be sure. I've been told that the GM recently told them that it is no longer allowed. Once again it is illegal to begin enforcing rules that have not been enforced prior to certification & while I cannot recall exact names of people that have been doing it I know that it was being done when Dave Propp was there and we were organizing as well as after certification. In talking to Kordel today he said that the number of people that do it is few, but with the busy schedule it was causing past dues and reschedules. I don't understand how management (above Kordel's level) can enforce status quo when it comes to the 10 Year bonus, but then ignore it when we get to enforcing rules that have not been enforced. Can we compromise by giving the South Holland techs the bonus given to everybody else in exchange for agreeing to the enforcement of the rule that has not been enforced until recently? We really should have had an agreement before Kordel was told to make the announcement.

Please provide the criteria used to determine the tech efficiency levels (i.e. what is used to determine tech efficiency where some are at a 1.4 rate vs. 1.0 or 1.6).

I'd like to see the Office scorecard that includes NPS and/or anything else that is different with Chicago South techs vs. the rest of the market for the past 4 quarters

Lastly, can you provide the completion percentage for Installs, Upgrades and Service calls respectively?

Thank you,

David E. Webster
Business Representative/Organizer
IBEW Local 21
630 222-9121

EXHIBIT C

From: Lauren Dudley
Sent: Friday, December 04, 2015 2:59 PM
To: 'Dave Webster' <dwebster@ibew21.org>
Subject: RE: Information Request

Dave,
Per your requests, please see below and attached.

So you're aware, I'll be going out on maternity leave within the next week or so. In my absence, please filter any questions in regards to a members performance, employment or issues at the office through Kordell. Any requests similar to the below or in regards to negotiations should be directed to Eric Simon.

Please let me know if you have any questions.

Lauren Dudley, PHR
Human Resources Director
UniTek Global Services
2010 Renaissance Blvd.
King of Prussia, PA 19406
*** office: 267.464.2783 * fax: 267-401-1561 * cell: 610.930.3030 * email:** ldudley@unitekgs.com

From: Dave Webster [mailto:dwebster@ibew21.org]
Sent: Monday, November 23, 2015 2:55 PM
To: Lauren Dudley <LDudley@unitekgs.com>
Subject: RE: Information Request

Lauren,

Thank you for the info. However, I've noticed that there are some missing names from the Tech Detail report. It looks like they are guys on disability or some sort of leave at the time this report was run, which leads me to a question on that report…what time period is the report for? I'm guessing it was for one day, but I didn't see a way to tell for sure. If so, which day? If not what time period? In general, the tech detail report is generated bi-weekly (twice per week).

The names missing from the report are Adams, Garza, Hickenbottom, Urbina, Carter, Conner & Griffith. I know about all of them but Adams & Hickenbottom being out on leave for a period of time and I think all of them except Carter, Conner and Griffith are back. Can you please run that report again (in a different time period) now that most have returned and if it IS only one day can you run a couple of days in different weeks so we can see the changes, please. See attached for week of 11/23 (only one report was generated for this week due to the holiday). Gregory Hickenbottom has been out on leave since 10/3/15.

Also, can you send me info on the amount of money earned by each tech during the time period of the report you already sent and the reports that will be sent from the request above? We are trying to work on wages and this information is important to be able to come to an agreement that the techs can live with. See attached

In addition, one of the company proposals references the HSP agreement with DTV. We'd like a copy of the agreement referenced in the proposal. See attached, relevant to scope of work

Also referenced in a proposal are performance standards utilized by the "Employers customer". We'd like to see the standards that DTV is asking you to meet. To be clear, not the metrics used by DSat derived *from* the standards set by the Employers customer, but the actual standards from DTV that DSat uses to form the scorecard metrics. Scorecard metrics for techs are decided and formed internally, not by DTV. Please refer to the tech Scorecard for the metrics and standards relevant to techs.

During bargaining Dan referenced a map with a radius for each tech. Can you provide an example (Map) that shows the radius of each tech and how it benefits the techs financially as per Dan? See attached map. A smaller radius means less drive time; less drive time between jobs is financially beneficial to techs in that they're spending more time on jobs, closing work, rather than driving.

In the Chicago South TOQ meeting Dan inadvertently showed a slide that talked about a bonus plan for senior techs (I believe it was for those with 10+ years) that is being rolled out in the market, but not in South Holland due to status Quo. Please provide info on that program so we can discuss.
10 Year Recognition Program – For all techs who have been with the Company for 10 years, without any gaps in employment:

- $1000 Net Payout
- Branded Shirt and Jacket
- $100 Visa Gift Card
- Scorecard – Never a Level 1, guarantee to move up a level
- Weekends Off – outside of weather issues or extremely high volume

Talking about status quo…I know you were looking for names of people that combine breaks & lunches to take a 60 minute lunch. The only names I have at the moment are Urbina and naturally Dillon. I believe that there are a few more, but haven't talked to them to be sure. I've been told that the GM recently told them that it is no longer allowed. Once again it is illegal to begin enforcing rules that have not been enforced prior to certification & while I cannot recall exact names of people that have been doing it I know that it was being done when Dave Propp was there and we were organizing as well as after certification. In talking to Kordel today he said that the number of people that do it is few, but with the busy schedule it was causing past dues and reschedules. I don't understand how management (above Kordel's level) can enforce status quo when it comes to the 10 Year bonus, but then ignore it when we get to enforcing

rules that have not been enforced. Can we compromise by giving the South Holland techs the bonus given to everybody else in exchange for agreeing to the enforcement of the rule that has not been enforced until recently? We really should have had an agreement before Kordel was told to make the announcement. As I've already expressed, I don't believe it is common practice that employees take an hour lunch, nor has it consistently been done in the past under previous management; therefore there's been no change to working conditions. At this point, you haven't provided any details or facts that change the companies view on continuing to enforce this rule.

To your point, rolling out the 10 year bonus would be a change to working conditions which we will not implement without negotiating with the union, as required.

Please provide the criteria used to determine the tech efficiency levels (i.e. what is used to determine tech efficiency where some are at a 1.4 rate vs. 1.0 or 1.6).
Criteria used to determine:

- Expediency level of the technician (fast vs slow)
- Tenure of the technician
- Skill Set of the Technician in combination of the completion rate of the market. In other words, the rate in which jobs should book to keep techs productive.
- Amount of Backlog in the system
- Tech Service Role

I'd like to see the Office scorecard that includes NPS and/or anything else that is different with Chicago South techs vs. the rest of the market for the past 4 quarters
Attached is 2015 Q2, Q3 and Q4 to date. Anything further back will take time to generate as our analytics team was not tracking prior to Q2 of this year.. I'm hoping the attached is sufficient for your purposes.

Lastly, can you provide the completion percentage for Installs, Upgrades and Service calls respectively?

November	Work Order Type	Completion Rate
South Holland	Former Install	80.15%
South Holland	New Install	64.79%
South Holland	Service	67.72%
South Holland	Upgrade	78.41%

Thank you,

David E. Webster
Business Representative/Organizer

EXHIBIT D

From: Dave Webster <dwebster@ibew21.org>
Sent: Friday, March 18, 2016 12:09 PM
To: Simon, Eric P. (NYC)
Subject: DSat Bargaining 3/22/16
Attachments: DSat Contractor Percentages.pdf

Mr. Simon,

To prepare for our next bargaining session I thought it might be worthwhile to highlight the key unresolved issues. As I see it the KEY issues are Wages, Benefits and New Product Lines. The last proposals on wages and benefits were passed by the union and the last New Product Line proposal was passed by the company.

I would also like to request information and relevant documents to show how the technician's scorecard is determined. Not only the metrics, but how the metrics are determined and by whom. Technicians have been told in the past by Jeff Jamison that the scorecard is decided and controlled by DirecTV and I have been told by the company that the scorecard is decided and formed internally not by DirecTV.

The union requests a FULL copy of the HSP agreement between DirectSat & DirecTV particularly because of the reference n the New Product Lines proposal.

Lastly, please see the attached and provide updated data as close to current date as possible.

Regards,

David E. Webster
Business Representative/Organizer
IBEW Local 21
630 222-9121

EXHIBIT E

From: Simon, Eric P. (NYC)
Sent: Wednesday, April 06, 2016 5:39 PM
To: Dave Webster
Cc: Lauren Dudley (ldudley@unitekgs.com); dyannantuono@directsatusa.net
Subject: DTV Performance Metrics
Attachments: Metrics_HSP Agreement.pdf

Mr. Webster: attached per your request are the current metrics established by DirecTV to measure the performance of DirectSat.

Eric P. Simon, Esq.
Principal
Jackson Lewis, P.C.
666 Third Avenue
New York, New York 10017
212-545-4014| Direct
212-972-3213| Fax
646-942-7476| Cell

simone@jacksonlewis.com

www.jacksonlewis.com

EXHIBIT F

From: Dave Webster [mailto:dwebster@ibew21.org]
Sent: Thursday, May 19, 2016 9:31 AM
To: Simon, Eric P. (NYC)
Subject: Bargaining info

Mr. Simon,

In connection with DirectSat negotiations I renew my request for a FULL copy of the HSP agreement between DirectSat and DirecTV/AT&T in addition to all current agreements with sub contractors, to evaluate the extent of control of DirectSat by DirecTV/AT&T.

Dave Webster
Business Rep/Organizer
IBEW Local Union 21
630 222-9121

EXHIBIT G

jackson|lewis
Attorneys at Law

Representing Management Exclusively in Workplace Law and Related Litigation

Jackson Lewis P.C.
666 Third Avenue
New York, New York 10017
Tel 212 545-4000
Fax 212 972-3213
www.jacksonlewis.com

ALBANY, NY	GREENVILLE, SC	MONMOUTH COUNTY, NJ	RALEIGH, NC
ALBUQUERQUE, NM	HARTFORD, CT	MORRISTOWN, NJ	RAPID CITY, SD
ATLANTA, GA	HONOLULU, HI*	NEW ORLEANS, LA	RICHMOND, VA
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BALTIMORE, MD	INDIANAPOLIS, IN	NORFOLK, VA	SALT LAKE CITY, UT
BIRMINGHAM, AL	JACKSONVILLE, FL	OMAHA, NE	SAN DIEGO, CA
BOSTON, MA	KANSAS CITY REGION	ORANGE COUNTY, CA	SAN FRANCISCO, CA
CHICAGO, IL	LAS VEGAS, NV	ORLANDO, FL	SAN JUAN, PR
CINCINNATI, OH	LONG ISLAND, NY	PHILADELPHIA, PA	SEATTLE, WA
CLEVELAND, OH	LOS ANGELES, CA	PHOENIX, AZ	ST. LOUIS, MO
DALLAS, TX	MEMPHIS, TN	PITTSBURGH, PA	STAMFORD, CT
DAYTON, OH	MIAMI, FL	PORTLAND, OR	TAMPA, FL
DENVER, CO	MILWAUKEE, WI	PORTSMOUTH, NH	WASHINGTON, DC REGION
DETROIT, MI	MINNEAPOLIS, MN	PROVIDENCE, RI	WHITE PLAINS, NY
GRAND RAPIDS, MI			

*through an affiliation with Jackson Lewis P.C., a Law Corporation

MY DIRECT DIAL IS: (212) 545-4014
MY EMAIL ADDRESS IS: SIMONE@JACKSONLEWIS.COM

May 23, 2016

VIA FACSIMILE (630-960-9607)

Mr. David Webster
Business Representative
Local 21, IBEW
1307 Butterfield Road, Suite 422
Downers Grove, Illinois 60515-5606

Re: IBEW :Local 21/May 19, 2016 Request for Copy of Contract between DirecTV and DirectSat

Dear Mr. Webster:

I want to take this opportunity to further explicate DirectSat's rational for declining to provide a complete copy of the HSP agreement between DirecTV and DirectSat (the "HSP Agreement").

Local 21, IBEW initially requested a copy of the HSP agreement via email dated November 23, 2016. The purported justification for the request was "…one of the company's proposal references the HSP agreement with DTV. We'd like a copy of the agreement referenced in the proposal." It was our understanding the request referred to DirectSat proposal No.78 dated November 4, 2015 entitled ***"New Product Lines" and which referenced the treatment of "products of services other than those provided pursuant to [DirectSat's] Home Service Provider agreement with DirecTV…"*** (emphasis in original). On November 23, 2015, Lauren Dudley responded with those portions of the HSP agreement delineating services provided by DirectSat pursuant to the HSP agreement.

On April 5, 2016 you again requested a full copy of the HSP agreement "particularly because of the referenced n[sic] the New Products Lines Proposal." Having already provided relevant information no further response was made.

On May 19, 2016 you again requested a full copy of the HSP agreement as well as "current agreements with subcontractors." This time however, the ostensible reason for this request was "to evaluate the extent of control of DirectSat by DirecTV/AT&T."

The request for the full copy of the HSP agreement to evaluate DirecTV's control over DirectSat is irrelevant to negotiations between DirectSat and Local 21 regarding terms and conditions of

jackson lewis
Attorneys at Law

employment of DirectSat employees. The "extent of control" of DirecTV over DirectSat has no bearing on negotiations over wages, hours, or other terms and conditions of employment which are exclusively controlled by DirectSat. As previously explained to you at the table, DirecTV does not, and has no control over the wages paid to DirectSat employees or the metrics used to evaluate the performance of unit employees. These decisions are vested exclusively in DirectSat. For the last 2+ years since Local 21 was certified as the representative of employees of DirectSat's Chicago South (now South Holland location), DirectSat has bargained in good faith over the wages, hours and other terms and conditions of employment of unit employees. DirecTV has no role in these negotiations. DirectSat has never asserted that it cannot agree to a proposal on any issue because DirecTV might disapprove. Nor is the ability of DirectSat to enter into a collective bargaining agreement with Local 21 subject to approval by DirecTV.

DirectSat has provided Local 21 with those portions of its contract with DirecTV which may have some relevance to our negotiations – the scope of work covered by the HSP agreement and the metrics used by DirecTV to evaluate the performance of DirectSat under the HSP agreement. (DirectSat did not object to providing this information on the basis that while DirectSat has full authority to set performance metrics for unit technicians, DirectSat has stated that the metrics established by DirecTV to evaluate DirectSat help inform DirectSat in establishing performance metrics for technicians.)

For all the foregoing reasons, the Union's request for the full HSP contract is not relevant to any issue in negotiations and DirectSat declines to provide it.

Very truly yours,

JACKSON LEWIS P.C.

Eric P. Simon

EPS/rg

cc: Dan Yannantuono
Lauren Dudley

4841-1857-6690, v. 1

EXHIBIT H

From: Simon, Eric P. (NYC)
Sent: Wednesday, June 22, 2016 3:39 PM
To: 'Dave Webster'
Subject: DirectSat-- Supplemental Response to May 19 Information Request

Mr. Webster:

This is a supplemental response to your email of May 19, 2016 (see below) in which you state: "In connection with DirectSat negotiations I renew my request for a FULL copy of the HSP agreement between DirectSat and DirecTV/AT&T in addition to all current agreements with sub contractors, to evaluate the extent of control of DirectSat by DirecTV/AT&T." Although I responded on behalf of DirectSat in full regarding your request for the contract between DirecTV and DirectSat, I recently realized I did not respond to your request for a copy of the "current agreements with sub contractors." Candidly, since your email of May 19 purported to justify the request for these documents " to evaluate the extent of control of DirectSat by DirecTV/AT&T" and it is so patently obvious that the contracts between DirectSat and *its* subcontractors have absolutely no bearing on the "extent of control of DirectSat by DirectTV/AT&T", that a response did not seem warranted. However, having recognized this oversight, please be advised that DirectSat declines to provide its subcontractor agreements since they are not relevant to the stated reason for your request. Moreover, we have already reached a tentative agreement in negotiations on the use of subcontractors, and thus the subcontracts are not relevant to any disputed issue in negotiations.

Eric P. Simon, Esq.
Principal
Jackson Lewis, P.C.
666 Third Avenue
New York, New York 10017
212-545-4014| Direct
212-972-3213| Fax
646-942-7476| Cell

simone@jacksonlewis.com

www.jacksonlewis.com

From: Dave Webster [mailto:dwebster@ibew21.org]
Sent: Thursday, May 19, 2016 9:31 AM

To: Simon, Eric P. (NYC)
Subject: Bargaining info

Mr. Simon,

In connection with DirectSat negotiations I renew my request for a FULL copy of the HSP agreement between DirectSat and DirecTV/AT&T in addition to all current agreements with sub contractors, to evaluate the extent of control of DirectSat by DirecTV/AT&T.

Dave Webster
Business Rep/Organizer
IBEW Local Union 21
630 222-9121

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 13
Dirksen Federal Building
219 South Dearborn Street, Suite 808
Chicago, IL 60604-1443

Agency Website:
www.nlrb.gov
Telephone: (312)353-7570
Fax: (312)886-1341

Download
NLRB
Mobile App

September 14, 2016

Lauren Dudley, Human Resources Director
DirectSat USA
479 Shoemaker Road, Suite 106
King of Prussia, PA 19406

Re: DirectSat USA
Case 13-CA-176621

Dear Ms. Dudley:

Enclosed is a copy of the second amended charge that has been filed in this case.

Investigator: This charge is being investigated by Field Attorney Kevin McCormick whose telephone number is (312)353-7594 and e-mail address is kevin.mccormick@nlrb.gov. If the agent is not available, you may contact Deputy Regional Attorney Richard Kelliher-Paz whose telephone number is (312)353-7629.

Presentation of Your Evidence: As you know, we seek prompt resolutions of labor disputes. Therefore, I urge you or your representative to submit a complete written account of the facts and a statement of your position with respect to the allegations in the second amended charge as soon as possible. If the Board agent later asks for more evidence, I strongly urge you or your representative to cooperate fully by promptly presenting all evidence relevant to the investigation. In this way, the case can be fully investigated more quickly.

Procedures: Your right to representation, the means of presenting evidence, and a description of our procedures, including how to submit documents, was described in the letter sent to you with the original charge in this matter. If you have any questions, please contact the Board agent.

Very truly yours,

Peter Sung Ohr
Regional Director

KM/dg
Enclosure:
Copy of second amended charge

cc: Douglas J. Klein
Jackson Lewis P.C.
666 3rd Avenue
New York, NY 10017-4011

FORM EXEMPT UNDER 44 U.S.C 3512

INTERNET FORM NLRB-501 (2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
SEDOND AMENDED CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case 13-CA-176621	Date Filed 9/14/16

INSTRUCTIONS:
File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
DirectSat USA

b. Tel. No. 267-464-1783
c. Cell No.
f. Fax No. 610-337-8051

d. Address *(Street, city, state, and ZIP code)*
479 Shoemaker Road, Suite 106
King of Prussia, PA 19406

e. Employer Representative
Lauren Dudley
Human Resources Director

g. e-Mail
idudley@unitekgs.com

h. Number of workers employed
45+

i. Type of Establishment *(factory, mine, wholesaler, etc.)*
Satellite TV

j. Identify principal product or service
Satellite TV

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and *(list subsections)* 8(a)(5) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge *(set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)*
Since on or about May 19, 2016 the employer has refused to provide the Union a full copy of the contract between DirectSat USA and DirecTV in connection with the negotiations with the first collective bargaining agreement between the parties.

3. Full name of party filing charge *(if labor organization, give full name, including local name and number)*
1BEW Local Union 21

4a. Address *(Street and number, city, state, and ZIP code)*
1301 W Butterfield Rd. Suite 422
Downers Grove, IL 60515

4b. Tel. No. 630 960-4466 xt 449
4c. Cell No. 630 222-9121
4d. Fax No. 630 960-9607
4e. e-Mail
dwebster@ibew21.org

5. Full name of national or international labor organization of which it is an affiliate or constituent unit *(to be filled in when charge is filed by a labor organization)*
International Brotherhood of Electrical Workers, AFL-CIO

6. DECLARATION
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By Dave Webster BUSINESS REP.
(signature of representative or person making charge) *(Print/type name and title or office, if any)*

Address 1301 W Butterfield Rd. Suite 422, Downers Grove, IL 60515 9/13/2016 *(date)*

Tel. No. 630 960-4466 xt 449
Office, if any, Cell No. 630 222-9121
Fax No. 630 960-9607
e-Mail dwebster@ibew21.org

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

DIRECTSAT USA, LLC

and **Case 13-CA-176621**

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 21

COMPLAINT AND NOTICE OF HEARING

This Complaint and Notice of Hearing is based on a charge filed by International Brotherhood of Electrical Workers, Local Union 21 (Charging Party). It is issued pursuant to Section 10(b) of the National Labor Relations Act (the Act), 29 U.S.C. § 151 et seq., and Section 102.15 of the Rules and Regulations of the National Labor Relations Board (the Board) and alleges that DirectSat USA, LLC (Respondent) has violated the Act as described below.

I

(a) The charge in this proceeding was filed by the Charging Party on May 20, 2016, and a copy was served on Respondent by U.S. mail on May 20, 2016.

(b) The first amended charge in this proceeding was filed by the Charging Party on June 13, 2016, and a copy was served on Respondent by U.S. mail on June 13, 2016.

(c) The second amended charge in this proceeding was filed by the Charging Party on September 14, 2016, and a copy was served on Respondent by U.S. mail on September 14 , 2016.

II

(a) At all material times, Respondent has been a limited liability company with an office and place of business in South Holland, Illinois, (Respondent's facility), and has been engaged in the service and installation of equipment for DirecTV Inc., a satellite television service.

(b) In conducting its business operations during the preceding 12 months, a representative period, Respondent has performed services valued in excess of $50,000 in States other than the State of Illinois.

(c) At all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

III

At all material times, the Charging Party has been a labor organization within the meaning of Section 2(5) of the Act.

IV

At all material times, Unnamed Agent held the position of Respondent's Counsel and has been an agent of Respondent within the meaning of Section 2(13) of the Act.

V

(a) The following employees of Respondent (the Unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time Installation/Service Technicians employed by the Employer at its facility located at 9951 W 190th St, Mokena, Illinois, 60448, but excluding all other employees, confidential employees, guards, and supervisors as defined in the Act.

(b) On February 11, 2014, the Charging Party was certified as the exclusive collective-bargaining representative of the Unit.

(c) At all times since February 11, 2014, based on Section 9(a) of the Act, the Charging Party has been the exclusive collective-bargaining representative of the Unit.

VI

(a) On about March 18, 2016 and again on May 19, 2016, the Charging Party requested in writing that Respondent furnish the Charging Party with a full copy of the Home Service Provider Agreement between Respondent and DirecTV.

(b) The information requested by the Charging Party, as described above in paragraph VI(a), is necessary for, and relevant to, the Charging Party's performance of its duties as the exclusive collective-bargaining representative of the Unit.

(c) Since about March 18, 2016, Respondent, by an unnamed agent of the Employer, has failed and refused to furnish the Charging Party with the information requested by it as described above in paragraph VI(a).

VII

(a) By the conduct described above in paragraphs VI(a) through (c), Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

(b) The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be **received by this office on or before October 7, 2016, or postmarked on or before October 6, 2016**. Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlrb.gov, click on **E-File Documents,** enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on **January 9, 2017, 11:00 a.m.** at **219 S. Dearborn Street, Ste 808, Chicago, IL. 60604**, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated: September 23, 2016

/s/ Daniel N. Nelson

Daniel Nelson
ACTING REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 13
Dirksen Federal Building
219 South Dearborn Street, Suite 808
Chicago, IL 60604-1443

Attachments

Form NLRB-4668
(6-2014)

Procedures in NLRB Unfair Labor Practice Hearings

The attached complaint has scheduled a hearing that will be conducted by an administrative law judge (ALJ) of the National Labor Relations Board who will be an independent, impartial finder of facts and applicable law. **You may be represented at this hearing by an attorney or other representative**. If you are not currently represented by an attorney, and wish to have one represent you at the hearing, you should make such arrangements as soon as possible. A more complete description of the hearing process and the ALJ's role may be found at Sections 102.34, 102.35, and 102.45 of the Board's Rules and Regulations. The Board's Rules and regulations are available at the following link: www.nlrb.gov/sites/default/files/attachments/basic-page/node-1717/rules_and_regs_part_102.pdf.

The NLRB allows you to file certain documents electronically and you are encouraged to do so because it ensures that your government resources are used efficiently. To e-file go to the NLRB's website at www.nlrb.gov, click on "e-file documents," enter the 10-digit case number on the complaint (the first number if there is more than one), and follow the prompts. You will receive a confirmation number and an e-mail notification that the documents were successfully filed.

Although this matter is set for trial, this does not mean that this matter cannot be resolved through a settlement agreement. The NLRB recognizes that adjustments or settlements consistent with the policies of the National Labor Relations Act reduce government expenditures and promote amity in labor relations and encourages the parties to engage in settlement efforts.

I. BEFORE THE HEARING

The rules pertaining to the Board's pre-hearing procedures, including rules concerning filing an answer, requesting a postponement, filing other motions, and obtaining subpoenas to compel the attendance of witnesses and production of documents from other parties, may be found at Sections 102.20 through 102.32 of the Board's Rules and Regulations. In addition, you should be aware of the following:

- **Special Needs:** If you or any of the witnesses you wish to have testify at the hearing have special needs and require auxiliary aids to participate in the hearing, you should notify the Regional Director as soon as possible and request the necessary assistance. Assistance will be provided to persons who have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.603.

- **Pre-hearing Conference:** One or more weeks before the hearing, the ALJ may conduct a telephonic prehearing conference with the parties. During the conference, the ALJ will explore whether the case may be settled, discuss the issues to be litigated and any logistical issues related to the hearing, and attempt to resolve or narrow outstanding issues, such as disputes relating to subpoenaed witnesses and documents. This conference is usually not recorded, but during the hearing the ALJ or the parties sometimes refer to discussions at the pre-hearing conference. You do not have to wait until the prehearing conference to meet with the other parties to discuss settling this case or any other issues.

II. DURING THE HEARING

The rules pertaining to the Board's hearing procedures are found at Sections 102.34 through 102.43 of the Board's Rules and Regulations. Please note in particular the following:

- **Witnesses and Evidence**: At the hearing, you will have the right to call, examine, and cross-examine witnesses and to introduce into the record documents and other evidence.

- **Exhibits: Each exhibit offered in evidence must be provided in duplicate to the court reporter and a copy of each of each exhibit should be supplied to the ALJ and each party when the exhibit is offered**

(OVER)

in evidence. If a copy of any exhibit is not available when the original is received, it will be the responsibility of the party offering such exhibit to submit the copy to the ALJ before the close of hearing. If a copy is not submitted, and the filing has not been waived by the ALJ, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

- **Transcripts**: An official court reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the ALJ for approval. Everything said at the hearing while the hearing is in session will be recorded by the official reporter unless the ALJ specifically directs off-the-record discussion. If any party wishes to make off-the-record statements, a request to go off the record should be directed to the ALJ.

- **Oral Argument:** You are entitled, on request, to a reasonable period of time at the close of the hearing for oral argument, which shall be included in the transcript of the hearing. Alternatively, the ALJ may ask for oral argument if, at the close of the hearing, if it is believed that such argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.

- **Date for Filing Post-Hearing Brief**: Before the hearing closes, you may request to file a written brief or proposed findings and conclusions, or both, with the ALJ. The ALJ has the discretion to grant this request and to will set a deadline for filing, up to 35 days.

III. AFTER THE HEARING

The Rules pertaining to filing post-hearing briefs and the procedures after the ALJ issues a decision are found at Sections 102.42 through 102.48 of the Board's Rules and Regulations. Please note in particular the following:

- **Extension of Time for Filing Brief with the ALJ:** If you need an extension of time to file a post-hearing brief, you must follow Section 102.42 of the Board's Rules and Regulations, which requires you to file a request with the appropriate chief or associate chief administrative law judge, depending on where the trial occurred. You must immediately serve a copy of any request for an extension of time on all other parties and furnish proof of that service with your request. You are encouraged to seek the agreement of the other parties and state their positions in your request.

- **ALJ's Decision:** In due course, the ALJ will prepare and file with the Board a decision in this matter. Upon receipt of this decision, the Board will enter an order transferring the case to the Board and specifying when exceptions are due to the ALJ's decision. The Board will serve copies of that order and the ALJ's decision on all parties.

- **Exceptions to the ALJ's Decision**: The procedure to be followed with respect to appealing all or any part of the ALJ's decision (by filing exceptions with the Board), submitting briefs, requests for oral argument before the Board, and related matters is set forth in the Board's Rules and Regulations, particularly in Section 102.46 and following sections. A summary of the more pertinent of these provisions will be provided to the parties with the order transferring the matter to the Board.

FORM NLRB 4338
(6-90)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
NOTICE

Case 13-CA-176621

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end.

An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing. However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements ***will not be granted*** unless good and sufficient grounds are shown ***and*** the following requirements are met:

(1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).

(2) Grounds must be set forth in ***detail***;

(3) Alternative dates for any rescheduled hearing must be given;

(4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; and

(5) Copies must be simultaneously served on all other parties (listed below), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

Lauren Dudley, Human Resources Director
DirectSat USA
479 Shoemaker Road, Suite 106
King of Prussia, PA 19406

Douglas J. Klein
Jackson Lewis P.C.
666 3rd Ave
New York, NY 10017-4011

David E. Webster , Business Representative
International Brotherhood of
Electrical Workers, Local Union 21
1307 West Butterfield Road, Suite 422
Downers Grove, IL 60515-5623

Edwin D. Hill , International President
International Brotherhood of
Electrical Workers, AFL-CIO
900 7th Street NW
Washington, DC 20001-4070

Carmella L. Thomas
International Brotherhood of
Electrical Workers
900 7th Street NW
Washington, DC 20001

Gilbert Cornfield, ESQ.
Cornfield and Feldman LLP
25 East Washington Street
Suite 1400
Chicago, IL 60602

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

DIRECTSAT USA, LLC, and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 21	Case No. 13-CA-176621

RESPONDENT'S ANSWER TO COMPLAINT AND NOTICE OF HEARING

In response to the Complaint and Notice of Hearing in this matter (the "Complaint"), Respondent DirectSAT USA, LLC ("Respondent"), by and through its attorneys, Jackson Lewis P.C., and pursuant to §102.20 and §102.21 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, respectfully answers the Complaint of the National Labor Relations Board ("NLRB" or the "Board") as follows:

1. (a) Admits the allegations set forth in Paragraph "I(a)" of the Complaint.

   (b) Admits the allegations set forth in Paragraph "I(b)" of the Complaint.

   (c) Admits the allegations set forth in Paragraph "I(c)" of the Complaint.

2. (a) Admits the allegations set forth in Paragraph "II(a)" of the Complaint.

   (b) Admits the allegations set forth in Paragraph "II(b)" of the Complaint.

   (c) Admits the allegations set forth in Paragraph "II(c)" of the Complaint.

3. Admits the allegations set forth in Paragraph "III(a)" of the Complaint.

4. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations set forth in Paragraph "IV" of the Complaint.

5. (a) Admits the allegations set forth in Paragraph "V(a)" of the Complaint.

(b) Admits the allegations set forth in Paragraph "V(b)" of the Complaint.

(c) Admits the allegations set forth in Paragraph "V(c)" of the Complaint.

6. (a) Admits the allegations set forth in Paragraph "VI(a)" of the Complaint, and avers that the Union also requested a copy of the Home Service Provider agreement between Respondent and DirecTV on November 23, 2015.

(b) Denies the allegations set forth in Paragraph "VI(b)" of the Complaint.

(c) Denies the allegations set forth in Paragraph "VI(c)" of the Complaint.

7. (a) Denies the allegations set forth in Paragraph "VII(a)" of the Complaint.

(b) Denies the allegations set forth in Paragraph "VII(b)" of the Complaint.

AFFIRMATIVE AND/OR SPECIFIED DEFENSES

As and for its affirmative defenses, Respondent alleges as follows:

AS AND FOR A FIRST DEFENSE

The Union requested a complete copy of the Home Service Provider agreement between Respondent and DirecTV on November 23, 2015, Respondent refused to provide a complete copy at that time, and more than six (6) months elapsed before the instant charge was filed with the Board.

* * *

Respondent reserves the right to amend its Answer to add additional affirmative defenses.

WHEREFORE, Respondent asks that the Complaint be dismissed in its entirety.

Respectfully submitted,

JACKSON LEWIS P.C.
666 Third Avenue
New York, New York 10017
(212) 545-4000

Dated: October 5, 2016
New York, New York

By: _____
Eric P. Simon
Douglas J. Klein

CERTIFICATE OF SERVICE

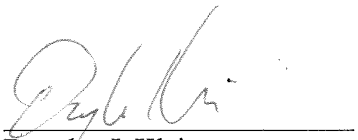
I hereby certify that on October 5, 2016, I caused a true and correct copy of the foregoing Respondent's Answer to the Complaint and Notice of Hearing to be served via Federal Express overnight mail on the following individuals at the specified addresses (to the extent e-mail address information was not available):

David E. Webster, Business Representative
IBEW, Local Union 21
1307 West Butterfield Road, Suite 422
Downers Grove, IL 60515-5623

Edwin D. Hill, International President
IBEW, AFL-CIO
900 7th Street NW
Washington, DC 20001-4070

Carmella L. Thomas
IBEW
900 7th Street NW
Washington, DC 20001

Gilbert Cornfield, Esq.
Cornfield and Feldman LLP
25 East Washington Street
Suite 1400
Chicago, IL 60602



Douglas J. Klein

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

DIRECTSAT USA, LLC

and **Case 13-CA-176621**

IBEW, LOCAL 21

ORDER POSTPONING HEARING INDEFINITELY

IT IS ORDERED that, with the agreement of all parties, the hearing in the above matter set for Monday, January 9, 2017 is hereby postponed indefinitely. The parties have agreed to prepare a Joint Motion to submit a Stipulated Record to the Administrative Law Judge.

Dated: January 4, 2017

/s/ Daniel N Nelson
Daniel N. Nelson
Acting Regional Director
National Labor Relations Board
Region 13
Dirksen Federal Building
219 South Dearborn Street, Suite 808
Chicago, IL 60604-2027

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

DIRECTSAT USA, LLC

and **Case 13-CA-176621**

IBEW, LOCAL 21

JOINT MOTION AND STIPULATION OF FACTS AND EXHIBITS

Before the Honorable Charles J. Muhl, Administrative Law Judge

Counsel for the General Counsel of the National Labor Relations Board , IBEW Local 21 ("Union" or "Charging Party"), and DirectSat USA, LLC ("Respondent" or "DirectSat") (collectively, "Parties"), all Parties to this proceeding, jointly move pursuant to Section 120.35(a)(9) of the Board's Rules and Regulations to waive a hearing before an Administrative Law Judge ("ALJ"), and for the making and filing of a Decision based upon this Joint Motion and Stipulation of Facts and Exhibits ("Joint Motion"). This Joint Motion will effectuate the purposes and policies of the Act and avoid unnecessary costs and delay.

If this Motion is granted, the parties agree to the following:

1. The record in this case consists of the Charge, the First Amended Charge, the Second Amended Charge, the Complaint, the Respondent's Answer, the Stipulation of Facts, the Statement of Issues Presented and each party's Statement of Position.

2. This case is submitted to the Administrative Law Judge for issuance of findings of fact, conclusions of law, and a recommended Order.

3. The parties waive a hearing before an Administrative Law Judge.

4. The parties respectfully request that the Administrative Law Judge set a deadline for the filing of briefs.

5. This stipulation is made without prejudice to any objection that any party may have as to the relevancy of any facts stated herein.

Statement of Issue Presented:

Whether the Respondent has violated Section 8(a)(5) of the Act by failing and refusing to provide the Union with a full un-redacted copy of the Home Service Provider Agreement ("HSP Agreement") between DirecTV and DirectSat.

Stipulation of Facts:

This Joint Stipulation of Facts, along with the attached Exhibits, contains the entire agreement between the parties, there being no other agreement of any kind, oral or otherwise, expressed or implied, which varies, alters, or adds to the Joint Stipulation of Facts.

A. Procedural Facts

1) The Charge in this proceeding was filed by the Union on May 20, 2016, and a copy was served by regular mail on Respondent on May 20, 2016. (Exhibit 1)

2) The First Amended Charge in this proceeding was filed by the Union on June 13, 2016, and a copy was served by regular mail on Respondent on June 13, 2016. (Exhibit 2)

3) The Second Amended Charge in this proceeding was filed by the Union on September 14, 2016, and a copy was served by regular mail on Respondent on September 14, 2016. (Exhibit

4) Complaint and Notice of Hearing issued September 23, 2016 and was served by certified mail on Respondent on September 23, 2016. (Exhibit 4)

5) Respondent's Answer to the September 23, 2016 Complaint was received on October 5, 2016. (Exhibit 5)

6) An Order Postponing Hearing Indefinitely issued on January 4, 2017. (Exhibit 6)

B. Substantive Facts

7) At all material times, Respondent has been a limited liability company with an office and place of business in South Holland, Illinois, and has been engaged in the service and installation of satellite television equipment for DirecTV Inc. ("DirecTV"), a satellite television service provider.

8) In conducting its business operations during the preceding 12 months, a representative period, Respondent has performed services valued in excess of $50,000 in States other than the State of Illinois.

9) At all material times Respondent has been an "employer" engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

10) At all material times, the Charging Party has been a "labor organization" within the meaning of Section 2(5) of the Act.

11) At all material times, Eric P. Simon, Esq. ("Simon") held the position of Respondent's outside legal counsel and chief spokesperson in connection with collective bargaining negotiations between Respondent and the Union. In that capacity Simon was an agent of Respondent within the meaning of Section 2(13) of the Act.

12) The following employees of Respondent (the "Unit") constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time Installation/Service Technicians employed by the Employer at its facility located at 9951 W 190th St, Mokena, Illinois, 60448, but excluding all other employees, confidential employees, guards, and supervisors as defined in the Act.[1]

13) On February 11, 2014, the Charging Party was certified as the exclusive collective-bargaining representative of the Unit.

[1] The Mokena facility relocated to South Holland, Illinois in or around May 2015.

14) At all times since February 11, 2014, based on Section 9(a) of the Act, the Charging Party has been the exclusive collective-bargaining representative of the Unit.

15) From September 4, 2014 through May 2016, the parties held approximately 24 bargaining sessions for a first contract and reached tentative agreements on many non-economic issues.

16) On November 12, 2014, Respondent presented its first New Product Lines proposal (Company Proposal No. 29) to the Union, relating to whether future products or services other than the installation and servicing of satellite television services would be deemed Unit work. (Exhibit 7)

17) On December 10, 2014, the Union presented Respondent with a counterproposal to Company Proposal 29. (Exhibit 8)

18) On September 15, 2015, Respondent presented the Union with its second New Product Lines proposal (Company Proposal No. 74) entitled, "Replaces Company Proposal No. 29, New Product Lines." (Exhibit 9)

19) On September 16, 2015, the Union presented Respondent with a counterproposal to Company Proposal No. 74 (Exhibit 10)

20) On November 4, 2015, Respondent presented the Union with Proposal No. 78 entitled, "Replaces Company Proposal No. 74, New Product Lines" containing the following language:

> "In the event the Employer is engaged with respect to product or services other than ***those pursuant to its Home Service Provider agreement with DirecTV***…"(Exhibit 11)

21) In response to Respondent's Proposal No. 78, on November 23, 2015, the Union through Business Representative Dave Webster ("Webster"), via email, made an information request to Respondent which provided in part:

> …"one of the company proposals references the HSP agreement with DTV. We'd like a copy of the agreement referenced in the proposal."… (Exhibit 12)

22) On December 4, 2015, Respondent, through its Human Resources Director, Lauren Dudley ("Dudley"), responded to the Union via email regarding the information requested by providing 3 pages of the HSP Agreement stating: "See attached, relevant to scope of work." (Exhibit 13) The document attached to Dudley's December 4, 2015 email contained redactions and comprised only a portion of the entire HSP Agreement.

23) On February 16, 2016, Webster, sent an email to Simon, which stated:

> I have heard that AT&T has extended the DirecTV contract with DirectSat for another 3 years. With AT&T & DirectSat both Installing the DirecTV Dish we need to understand the relationship between AT&T & DirectSat and the shared work. Please send a copy of the current agreement between DirectSat & AT&T/DTV for use in bargaining. (Exhibit 14)[2]

24) On February 20, 2016, Simon responded to Webster's February 16th email stating:

> We have no idea what you have heard or whom you have heard it from, but your "information" is erroneous. DirectSat has entered into no new agreements with AT&T. In early 2015, DirecTV extended its contract with DirectSat through 2018, but there has been nothing further.
>
> As to the substance of your request, you seem to assert is relevant because you believe DirecTV (I assume you refer to AT&T because of the recent acquisition of DirecTV by AT&T) and DirectSat have "shared" work. Again, you are mistaken. There is no "shared" work. As far as DirectSat is concerned, all of the work is DirecTV's. DirecTV currently has, and always has had, the right to contract as much or as little or none of its satellite TV system installation and service work to DirectSat as it, in its sole discretion, may decide. DirectSat only performs the work that DirecTV authorizes it to perform. DirectSat has never had an exclusive right to install/service DirecTV systems. Just as DirecTV had the ability to decide to whom it would contract with or if it would contract out installation/service work at all prior to the AT&T-DirecTV merger, DirecTV (even as a subsidiary of AT&T) continues to determine what and how much work to contract out. This is not an issue DirectSat has any control over or ever had any control over, and as such is not a mandatory subject of bargaining. Bargaining unit work has been and will continue to be the installation and service of DirecTV

[2] On or about July 24, 2015, DirectTV was acquired by AT&T.

> systems to the extent and degree DirecTV authorizes DirectSat to perform such work. While Local 21 may have an issue with DirecTV's subcontracting of such work, it is not relevant to our negotiations. (Exhibit 15)

25) On March 18, 2016, Webster renewed the Union's information request and sent Simon an email stating:

> "The union requests a FULL copy of the HSP agreement between DirectSat & DirecTV particularly because of the reference in the New Product Lines proposal." (Exhibit 16)

26) The Parties met for a bargaining session on March 22, 2016. At the bargaining session Simon acknowledged the Union's March 18, 2016 request for a full copy of the HSP Agreement. Simon stated that Respondent had already provided the Union with the relevant portions of the HSP Agreement. Later at the same bargaining session the Union presented its counterproposal to Company Proposal No. 78 (New Product Lines). (Exhibit 17)

27) On April 5, 2016, Webster emailed Simon stating in part:

> The union requests a FULL copy of the HSP agreement between DirectSat & DirecTV particularly because of the reference n [sic] the New Product Lines proposal. (Exhibit 18)

28) On April 6, 2016, Simon, responded to Webster via email providing each "current metrics established by DirecTV to measure the performance of DirectSat". The pages contained redactions. (Exhibit 19).

29) On May 19, 2016, at 9:31 a.m.., Webster sent an email to Simon stating:

> Mr. Simon,
>
> In Connection with DirectSat negotiations I renew my request for a FULL copy of the HSP agreement between DirectSat and DirecTV/AT&T in addition to all current agreements with sub contractors [sic], to evaluate the extent of control of DirectSat by DirecTV/AT&T. (Exhibit 20)

30) On May 19, 2016, at 10:28 a.m. Simon responded:

> Dear Mr Webster [sic]: We have already provided you with all relevant information regarding this request. We see no reason to supplement our response. (Exhibit 21)

31) On May 23, 2016 Respondent's attorney, Simon, faxed a letter to Webster explaining why it was declining to provide a complete copy of the HSP agreement. (Exhibit 22)

32) On May 20, 2016, the Charging Party Union filed this instant charge.

33) On May 24, 2016, the Parties met for a collective bargaining session at which the New Product Lines proposal was discussed. To date Respondent has not provided the Union with a full, un-redacted copy of the HSP agreement.

Conclusion:

The parties respectfully request that the Administrative Law Judge grant the instant Joint Motion, set a briefing schedule, and adjudicate the case based upon the above Joint Stipulation of Facts.

Respectfully submitted,

DATED: April 10, 2017 **NATIONAL LABOR RELATIONS BOARD**

By: */s/ Elizabeth S. Cortez*

Elizabeth S. Cortez, Attorney
Counsel for the General Counsel
National Labor Relations Board, Region 13
Dirksen Federal Building
219 S. Dearborn Street, Suite 808
Chicago, IL 60604
(312)-353-4174
elizabeth.cortez@nlrb.gov

DATED: April 10, 2017

By: _____

Eric P. Simon, Attorney
Douglas J. Klein, Attorney
JACKSON LEWIS P.C.
666 Third Avenue
New York, NY 10017
(212)545-4000
simone@jacksonlewis.com
douglas.klein@jacksonlewis.com

DATED: April 10, 2017

By: */s/ Gilbert Cornfield* (EC)

Gilbert Cornfield, Attorney
CORNFIELD AND FELDMAN LLP
25 East Washington Street
Suite 1400
Chicago, IL 60602
(312) 236-7800
gcornfield@cornfieldandfeldman.com

INDEX AND DESCRIPTION OF JOINT EXHIBITS

Exhibit 1	Charge filed May 20, 2016
Exhibit 2	First Amended Charge filed June 13, 2016
Exhibit 3	Second Amended Charged filed September 14, 2016
Exhibit 4	Complaint and Notice of Hearing, issued September 23, 2016
Exhibit 5	Respondent's Answer, received October 5, 2016
Exhibit 6	Order Postponing Hearing Indefinitely issued January 4, 2017
Exhibit 7	Respondent's Proposal No. 29 entitled New Product Lines dated November 12, 2014
Exhibit 8	Union's counterproposal to Respondent's Proposal 29 dated December 10, 2014
Exhibit 9	Respondent's second New Product Line proposal entitled, Replaces Company Proposal No.29, New Product Lines dated September 15, 2015
Exhibit 10	Union's counterproposal to Company Proposal No. 74 dated September 16, 2015
Exhibit 11	Respondent's Proposal No. 78 entitled, Replaces Company Proposal No. 74, New Product Lines dated November 4, 2015
Exhibit 12	Union's request for information requesting the Home Service Provider ("HSP") dated November 23, 2015
Exhibit 13	Respondent's response to Union's information request dated December 4, 2015 including a redacted copy consisting of 3 pages of the HSP Agreement
Exhibit 14	Webster email of February 16, 2016 requesting information and copy of current agreement between DirectSat & AT&T/DTV
Exhibit 15	Simon email of February 20, 2016 in response to the information request
Exhibit 16	Union's email renewing its request for a FULL copy of the HSP Agreement dated March 18, 2016
Exhibit 17	Union's counterproposal to Company Proposal No. 78, New Product Lines dated March 22, 2016
Exhibit 18	Union's email renewing its request for a second time for a FULL copy of the HSP Agreement dated April 5, 2016
Exhibit 19	Respondent's email response dated April 6, 2016 including a heavily redacted copy of the seventh amendment to the HSP Agreement
Exhibit 20	Union's email renewing its request for a third time for a FULL copy of the HSP Agreement dated May 19, 2016)
Exhibit 21	Respondent's email dated May 19, 2016 responding to the Union's email request earlier that day indicating all relevant information had been provided
Exhibit 22	Letter faxed to Webster from Simon dated 5/23/16, explaining Respondent's rationale for declining to provide complete copy of HSP Agreement

DIRECTSAT USA, LLC

and **Case 13-CA-176621**

IBEW, LOCAL 21

CERTIFICATE OF SERVICE

The undersigned affirms that on April 10, 2017, the partiers' JOINT MOTION AND STIPULATION OF FACTS AND EXHIBITS ("Joint Motion") was e-filed with the NLRB Division of Judges and served upon the following persons in the following manner:

Charles J. Muhl, Administrative Law Judge
National Labor Relations Board
1015 Half Street SE, Suite 6034
Washington, DC 20570
(202) 501-8800
Charles.Muhl@nlrb.gov

Douglas J. Klein, Attorney
Eric P. Simon, Attorney
JACKSON LEWIS P.C.
666 Third Avenue
New York, NY 10017
(212)545-4000
simone@jacksonlewis.com
kleind@jacksonlewis.com

Gilbert Cornfield, Attorney
CORNFIELD AND FELDMAN LLP
25 East Washington Street
Suite 1400
Chicago, IL 60602
(312) 236-7800
gcornfield@cornfieldandfeldman.com

/s/ Elizabeth S. Cortez
Elizabeth S. Cortez, Attorney
Counsel for the General Counsel
National Labor Relations Board, Region 13
Dirksen Federal Building
219 S. Dearborn Street, Suite 808
Chicago, IL 60604
(312)-353-4174
elizabeth.cortez@nlrb.gov

FORM EXEMPT UNDER 44 U.S.C 3512

INTERNET FORM NLRB-501 (2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case	Date Filed
13-CA-176621	5/20/16

INSTRUCTIONS:
File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
DirectSat USA

b. Tel. No. 267.464.2783

c. Cell No.

f. Fax No. 610-337-8051

g. e-Mail
ldudley@unitekgs.com

h. Number of workers employed
Approx. 45

d. Address *(Street, city, state, and ZIP code)*
479 Shoemaker Road, Suite 106
King of Prussia, PA 19406

e. Employer Representative
Lauren Dudley
Human Resources Director

i. Type of Establishment *(factory, mine, wholesaler, etc.)*
Video Services Provider

j. Identify principal product or service
Satellite TV

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and *(list subsections)* 8(a)(5) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge *(set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)*

Since on or about May 19, 2016 the employer has refused to provide the Union a full copy of the contract between DirectSat and DirecTV in connection with the negotiations with the first collective bargaining agreement between the parties.

3. Full name of party filing charge *(if labor organization, give full name, including local name and number)*
IBEW Local Union 21

4a. Address *(Street and number, city, state, and ZIP code)*
1307 W Butterfield Rd., Suite 422
Downers Grove, IL 60515

4b. Tel. No. 630 960-4466 ext 449

4c. Cell No. 630 222-9121

4d. Fax No. 630 960-9607

4e. e-Mail
dwebster@ibew21.org

5. Full name of national or international labor organization of which it is an affiliate or constituent unit *(to be filled in when charge is filed by a labor organization)*
International Brotherhood of Electrical Workers

6. DECLARATION
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By David E Webster
(signature of representative or person making charge) *(Print/type name and title or office, if any)*

Address 1307 Butterfield Rd., Suite 422 Downers Grove, IL 60515

5/20/16
(date)

Tel. No. 630 222-9121

Office, if any, Cell No. 630 960-4466 ext 449

Fax No. 630 960-9607

e-Mail
dwebster@ibew21.org

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

Exhibit 1

NATIONAL LABOR RELATIONS BOARD

CERTIFICATE OF SERVICE

I hereby certify that on the 20th of May, 2016, I served a copy of the foregoing Charge Against Employer by emailing same to the following:

Lauren Dudley
Human Resources Director
ldudley@unitekgs.com

Elisa Redish

Elisa Redish

Elisa Redish
Associate
Cornfield and Feldman LLP
25 East Washington Street
Suite 1400
Chicago, IL 60602

FIRST AMENDED

FORM EXEMPT UNDER 44 U.S.C 3512

INTERNET FORM NLRB-501 (2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case	Date Filed
13-CA-176621	6/13/16

INSTRUCTIONS:
File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
DirectSat USA

b. Tel. No. 267-464-1783-

c. Cell No.

f. Fax No. 6103378051

d. Address *(Street, city, state, and ZIP code)*
479 Shoemaker Road, Suite 106
King of Prussia, PA 19406

e. Employer Representative
Lauren Dudley
Human Resources Director

g. e-Mail
ldudley@unitekgs.com

h. Number of workers employed
Approx. 45

i. Type of Establishment *(factory, mine, wholesaler, etc.)*
Video Services Provider

j. Identify principal product or service
Satellite TV

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and *(list subsections)* 8(a)(5) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge *(set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)*
Since on or about May 19, 2016 the employer has refused to provide the Union a full copy of the contract between DirectSat USA and DirecTV in connection with the negotiations with the first collective bargaining agreement between the parties. In addition, since on or about May 19, 2016 the employer has refused to provide the Union all current agreements with sub contractors.

3. Full name of party filing charge *(if labor organization, give full name, including local name and number)*
IBEW Local Union 21

4a. Address *(Street and number, city, state, and ZIP code)*
1301 W Butterfield Rd. Suite 422
Downers Grove, IL 60515

4b. Tel. No. 630 960-4466 xt 449

4c. Cell No. 630 222-9121

4d. Fax No. 630 960-9607

4e. e-Mail
dwebster@ibew21.org

5. Full name of national or international labor organization of which it is an affiliate or constituent unit *(to be filled in when charge is filed by a labor organization)*
International Brotherhood of Electrical Workers, AFL-CIO

6. DECLARATION
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By David E Webster DAVID E WEBSTER Bus. Rep
(signature of representative or person making charge) *(Print/type name and title or office, if any)*

Address 1307 W Butterfield Rd. Suite 422, Downers Grove, IL 60515 6/10/16 *(date)*

Tel. No. 630 222-9121

Office, if any, Cell No. 630 960-4466xt 449

Fax No. 630 960-9607

e-Mail
dwebster@ibew21.org

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PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

Exhibit 2

FORM EXEMPT UNDER 44 U.S.C 3512

INTERNET FORM NLRB-501 (2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
SEDOND AMENDED CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case	Date Filed
13-CA-176621	9/14/16

INSTRUCTIONS:
File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
DirectSat USA

b. Tel. No. 267-464-1783

c. Cell No.

f. Fax No. 610-337-8051

d. Address *(Street, city, state, and ZIP code)*
479 Shoemaker Road, Suite 106
King of Prussia, PA 19406

e. Employer Representative
Lauren Dudley
Human Resources Director

g. e-Mail
idudley@unitekgs.com

h. Number of workers employed
45+

i. Type of Establishment *(factory, mine, wholesaler, etc.)*
Satellite TV

j. Identify principal product or service
Satellite TV

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and *(list subsections)* 8(a)(5) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge *(set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)*
Since on or about May 19, 2016 the employer has refused to provide the Union a full copy of the contract between DirectSat USA and DirecTV in connection with the negotiations with the first collective bargaining agreement between the parties.

3. Full name of party filing charge *(if labor organization, give full name, including local name and number)*
1BEW Local Union 21

4a. Address *(Street and number, city, state, and ZIP code)*
1301 W Butterfield Rd. Suite 422
Downers Grove, IL 60515

4b. Tel. No. 630 960-4466 xt 449

4c. Cell No. 630 222-9121

4d. Fax No. 630 960-9607

4e. e-Mail
dwebster@ibew21.org

5. Full name of national or international labor organization of which it is an affiliate or constituent unit *(to be filled in when charge is filed by a labor organization)*
International Brotherhood of Electrical Workers, AFL-CIO

6. DECLARATION
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By Dave E Webster — Dave Webster BUSINESS REP.
(signature of representative or person making charge) *(Print/type name and title or office, if any)*

Address 1301 W Butterfield Rd. Suite 422, Downers Grove, IL 60515 — 9/13/2016 *(date)*

Tel. No. 630 960-4466 xt 449

Office, if any, Cell No. 630 222-9121

Fax No. 630 960-9607

e-Mail
dwebster@ibew21.org

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PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

Exhibit 3

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

DIRECTSAT USA, LLC

and **Case 13-CA-176621**

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 21

COMPLAINT AND NOTICE OF HEARING

This Complaint and Notice of Hearing is based on a charge filed by International Brotherhood of Electrical Workers, Local Union 21 (Charging Party). It is issued pursuant to Section 10(b) of the National Labor Relations Act (the Act), 29 U.S.C. § 151 et seq., and Section 102.15 of the Rules and Regulations of the National Labor Relations Board (the Board) and alleges that DirectSat USA, LLC (Respondent) has violated the Act as described below.

I

(a) The charge in this proceeding was filed by the Charging Party on May 20, 2016, and a copy was served on Respondent by U.S. mail on May 20, 2016.

(b) The first amended charge in this proceeding was filed by the Charging Party on June 13, 2016, and a copy was served on Respondent by U.S. mail on June 13, 2016.

(c) The second amended charge in this proceeding was filed by the Charging Party on September 14, 2016, and a copy was served on Respondent by U.S. mail on September 14 , 2016.

II

(a) At all material times, Respondent has been a limited liability company with an office and place of business in South Holland, Illinois, (Respondent's facility), and has been engaged in the service and installation of equipment for DirecTV Inc., a satellite television service.

(b) In conducting its business operations during the preceding 12 months, a representative period, Respondent has performed services valued in excess of $50,000 in States other than the State of Illinois.

(c) At all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

Exhibit 4

III

At all material times, the Charging Party has been a labor organization within the meaning of Section 2(5) of the Act.

IV

At all material times, Unnamed Agent held the position of Respondent's Counsel and has been an agent of Respondent within the meaning of Section 2(13) of the Act.

V

(a) The following employees of Respondent (the Unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time Installation/Service Technicians employed by the Employer at its facility located at 9951 W 190th St, Mokena, Illinois, 60448, but excluding all other employees, confidential employees, guards, and supervisors as defined in the Act.

(b) On February 11, 2014, the Charging Party was certified as the exclusive collective-bargaining representative of the Unit.

(c) At all times since February 11, 2014, based on Section 9(a) of the Act, the Charging Party has been the exclusive collective-bargaining representative of the Unit.

VI

(a) On about March 18, 2016 and again on May 19, 2016, the Charging Party requested in writing that Respondent furnish the Charging Party with a full copy of the Home Service Provider Agreement between Respondent and DirecTV.

(b) The information requested by the Charging Party, as described above in paragraph VI(a), is necessary for, and relevant to, the Charging Party's performance of its duties as the exclusive collective-bargaining representative of the Unit.

(c) Since about March 18, 2016, Respondent, by an unnamed agent of the Employer, has failed and refused to furnish the Charging Party with the information requested by it as described above in paragraph VI(a).

VII

(a) By the conduct described above in paragraphs VI(a) through (c), Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

(b) The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be **received by this office on or before October 7, 2016, or postmarked on or before October 6, 2016**. Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlrb.gov, click on **E-File Documents,** enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on **January 9, 2017**, **11:00 a.m.** at **219 S. Dearborn Street, Ste 808, Chicago, IL. 60604**, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated: September 23, 2016

/s/ Daniel N. Nelson

Daniel Nelson
ACTING REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 13
Dirksen Federal Building
219 South Dearborn Street, Suite 808
Chicago, IL 60604-1443

Attachments

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

DIRECTSAT USA, LLC, and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 21	Case No. 13-CA-176621

RESPONDENT'S ANSWER TO COMPLAINT AND NOTICE OF HEARING

In response to the Complaint and Notice of Hearing in this matter (the "Complaint"), Respondent DirectSAT USA, LLC ("Respondent"), by and through its attorneys, Jackson Lewis P.C., and pursuant to §102.20 and §102.21 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, respectfully answers the Complaint of the National Labor Relations Board ("NLRB" or the "Board") as follows:

1. (a) Admits the allegations set forth in Paragraph "I(a)" of the Complaint.

   (b) Admits the allegations set forth in Paragraph "I(b)" of the Complaint.

   (c) Admits the allegations set forth in Paragraph "I(c)" of the Complaint.

2. (a) Admits the allegations set forth in Paragraph "II(a)" of the Complaint.

   (b) Admits the allegations set forth in Paragraph "II(b)" of the Complaint.

   (c) Admits the allegations set forth in Paragraph "II(c)" of the Complaint.

3. Admits the allegations set forth in Paragraph "III(a)" of the Complaint.

4. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations set forth in Paragraph "IV" of the Complaint.

5. (a) Admits the allegations set forth in Paragraph "V(a)" of the Complaint.

Exhibit 5

(b) Admits the allegations set forth in Paragraph "V(b)" of the Complaint.

(c) Admits the allegations set forth in Paragraph "V(c)" of the Complaint.

6. (a) Admits the allegations set forth in Paragraph "VI(a)" of the Complaint, and avers that the Union also requested a copy of the Home Service Provider agreement between Respondent and DirecTV on November 23, 2015.

(b) Denies the allegations set forth in Paragraph "VI(b)" of the Complaint.

(c) Denies the allegations set forth in Paragraph "VI(c)" of the Complaint.

7. (a) Denies the allegations set forth in Paragraph "VII(a)" of the Complaint.

(b) Denies the allegations set forth in Paragraph "VII(b)" of the Complaint.

AFFIRMATIVE AND/OR SPECIFIED DEFENSES

As and for its affirmative defenses, Respondent alleges as follows:

AS AND FOR A FIRST DEFENSE

The Union requested a complete copy of the Home Service Provider agreement between Respondent and DirecTV on November 23, 2015, Respondent refused to provide a complete copy at that time, and more than six (6) months elapsed before the instant charge was filed with the Board.

* * *

Respondent reserves the right to amend its Answer to add additional affirmative defenses.

WHEREFORE, Respondent asks that the Complaint be dismissed in its entirety.

Respectfully submitted,

JACKSON LEWIS P.C.
666 Third Avenue
New York, New York 10017
(212) 545-4000

Dated: October 5, 2016
New York, New York

By: _____
Eric P. Simon
Douglas J. Klein

CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2016, I caused a true and correct copy of the foregoing Respondent's Answer to the Complaint and Notice of Hearing to be served via Federal Express overnight mail on the following individuals at the specified addresses (to the extent e-mail address information was not available):

David E. Webster, Business Representative
IBEW, Local Union 21
1307 West Butterfield Road, Suite 422
Downers Grove, IL 60515-5623

Edwin D. Hill, International President
IBEW, AFL-CIO
900 7th Street NW
Washington, DC 20001-4070

Carmella L. Thomas
IBEW
900 7th Street NW
Washington, DC 20001

Gilbert Cornfield, Esq.
Cornfield and Feldman LLP
25 East Washington Street
Suite 1400
Chicago, IL 60602

Douglas J. Klein

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

DIRECTSAT USA, LLC

and **Case 13-CA-176621**

IBEW, LOCAL 21

ORDER POSTPONING HEARING INDEFINITELY

IT IS ORDERED that, with the agreement of all parties, the hearing in the above matter set for Monday, January 9, 2017 is hereby postponed indefinitely. The parties have agreed to prepare a Joint Motion to submit a Stipulated Record to the Administrative Law Judge.

Dated: January 4, 2017

/s/ Daniel N Nelson
Daniel N. Nelson
Acting Regional Director
National Labor Relations Board
Region 13
Dirksen Federal Building
219 South Dearborn Street, Suite 808
Chicago, IL 60604-2027

Exhibit 6

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

DIRECTSAT USA, LLC

and **Case 13-CA-176621**

IBEW, LOCAL 21

AFFIDAVIT OF SERVICE OF: Order Postponing Hearing Indefinitely, dated January 4, 2017.

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on January 4, 2017**,** I served the above-entitled document(s) by **regular mail** upon the following persons, addressed to them at the following addresses:

Lauren Dudley , Human Resources Director
DirectSat USA
479 Shoemaker Road, Suite 106
King of Prussia, PA 19406

Douglas J. Klein
Jackson Lewis, P.C.
666 Third Avenue, 20th Floor
New York, NY 10017-4011

David E. Webster, Business Representative
International Brotherhood Of Electrical Workers,
Local Union 21
1307 West Butterfield Road, Suite 422
Downers Grove, IL 60515-5623

Edwin D. Hill, International President
International Brotherhood of Electrical Workers, AFL-CIO
900 7th Street NW
Washington, DC 20001-4070

Carmella L. Thomas, Union Representative IBEW
900 7th Street NW
Washington, DC 20001

Gilbert Cornfield , Esq.
Cornfield and Feldman LLP
25 East Washington Street, Suite 1400
Chicago, IL 60602

January 4, 2017	Denise Gatsoudis, Designated Agent of NLRB
Date	Name
	/s/ Denise Gatsoudis
	Signature

DIRECTSAT USA

PROPOSAL NO. 29

NEW PRODUCT LINES

In the event the Employer is engaged with respect to products or services other than the installation and servicing of satellite television services, such work shall not be deemed bargaining unit work. If however, in the sole and exclusive discretion of the Employer, the Employer shall determine to assign work regarding such new product lines to bargaining unit employees, the Employer shall determine the number of employees to be assigned to such work, the locations in which such work shall be assigned to unit employees, the skills and abilities required of employees to be assigned to such work and the wage scales applicable to such work. Once assigned to bargaining unit personnel however, work involving new product lines and/or services may be removed by the Employer from the bargaining unit and such decision shall not be subject to grievance and arbitration. Upon request by the Union, the Employer shall meet and discuss the terms and conditions of work related to such new product lines and/or services. Any agreement reached by the parties shall be reduced to writing and made a part of this Agreement. However, in the event the parties are unable to reach an agreement regarding such new product lines or services, such disagreements shall not be subject to the grievance and arbitration provisions of this Agreement nor release the Union or employees from the no-strike provisions of this Agreement.

Exhibit 7

Union Counter to Company Proposal 29

DIRECTSAT USA

PROPOSAL NO. 29

December 10, 2014

NEW PRODUCT LINES

In the event the Employer is engaged with respect to products or services other than the installation and servicing of satellite television services, such work shall ~~not~~ be deemed bargaining unit work. ~~If however, in the sole and exclusive discretion of the Employer,~~ **When** the Employer ~~shall~~ determines to assign work regarding such new product lines to bargaining unit employees, the Employer shall determine the number of employees to be assigned to such work, the locations in which such work shall be assigned to unit employees, the skills and abilities required of employees to be assigned to such work, ~~and the wage scales applicable to such work.~~ ~~Once assigned to bargaining unit personnel however, work involving new product lines and/or services may be removed by the Employer from the bargaining unit and such decision shall not be subject to grievance and arbitration. Upon request by the Union,~~ The Employer shall meet and discuss the terms and conditions of work related to such new product lines and/or services. Any agreement reached by the parties shall be reduced to writing and made a part of this Agreement. ~~However,~~ In the event the parties are unable to reach an agreement regarding such new product lines or services, such disagreements shall ~~not~~ be subject to the grievance and arbitration provisions of this Agreement, ~~nor release the Union or employees from the no strike provisions of this Agreement.~~

Exhibit 8

PROPOSAL NO. 74

September 15, 2015

Replaces Company Proposal No. 29

NEW PRODUCT LINES

In the event the Employer is engaged with respect to products or services other than the installation and servicing of satellite **based** ~~television~~ services, such work shall not be deemed bargaining unit work. If however, in the sole and exclusive discretion of the Employer, the Employer shall determine to assign work regarding such new product lines to bargaining unit employees, the Employer shall determine the number of employees to be assigned to such work, the locations in which such work shall be assigned to unit employees, the skills and abilities required of employees to be assigned to such work and the wage scales applicable to such work. Once assigned to bargaining unit personnel however, work involving new product lines and/or services may be removed by the Employer from the bargaining unit and such decision shall not be subject to grievance and arbitration. Upon request by the Union, the Employer shall meet and discuss the terms and conditions of work related to such new product lines and/or services. Any agreement reached by the parties shall be reduced to writing and made a part of this Agreement. However, in the event the parties are unable to reach an agreement regarding such new product lines or services, such disagreements shall not be subject to the grievance and arbitration provisions of this Agreement nor release the Union or employees from the no-strike provisions of this Agreement.

Exhibit 9

UNION counter to

Company proposal No. 74

09/16 /15

New Product Lines

In the event the Employer is engaged with respect to audio, video, and communications services, such work shall be deemed bargaining unit work. The employer will notify the union prior to introducing the new services or products. The union and the company will negotiate wages and working conditions for the new work to be performed. Prior to an agreement, the new product or service may be deployed. In the event the parties are unable to reach an agreement regarding wages and working conditions for the new product or services, such disagreements shall be subject to the arbitration provisions of the agreement.

Exhibit 10

PROPOSAL NO. 78

November 4, 2015

Replaces Company Proposal No. 74

NEW PRODUCT LINES

In the event the Employer is engaged with respect to products or services other than ***those provided pursuant to its Home Service Provider agreement with DirecTV,*** ~~the installation and servicing of satellite~~ **based** ~~television services,~~ such work shall not be deemed bargaining unit work. If however, in the sole and exclusive discretion of the Employer, the Employer shall determine to assign work regarding such new product lines to bargaining unit employees, the Employer shall determine the number of employees to be assigned to such work, the locations in which such work shall be assigned to unit employees, the skills and abilities required of employees to be assigned to such work and the wage scales applicable to such work. Once assigned to bargaining unit personnel however, work involving new product lines and/or services may be removed by the Employer from the bargaining unit and such decision shall not be subject to grievance and arbitration. Upon request by the Union, the Employer shall meet and discuss the terms and conditions of work related to such new product lines and/or services. Any agreement reached by the parties shall be reduced to writing and made a part of this Agreement. However, in the event the parties are unable to reach an agreement regarding such new product lines or services, such disagreements shall not be subject to the grievance and arbitration provisions of this Agreement nor release the Union or employees from the no-strike provisions of this Agreement.

Exhibit 11

From: Dave Webster [mailto:dwebster@ibew21.org]
Sent: Monday, November 23, 2015 2:55 PM
To: Lauren Dudley <LDudley@unitekgs.com>
Subject: RE: Information Request

Lauren,

Thank you for the info. However, I've noticed that there are some missing names from the Tech Detail report. It looks like they are guys on disability or some sort of leave at the time this report was run, which leads me to a question on that report…what time period is the report for? I'm guessing it was for one day, but I didn't see a way to tell for sure. If so, which day? If not what time period?

The names missing from the report are REDACTED REDACTED. I know about all of them but REDACTED being out on leave for a period of time and I think all of them except REDACTED are back. Can you please run that report again (in a different time period) now that most have returned and if it IS only one day can you run a couple of days in different weeks so we can see the changes, please.

Also, can you send me info on the amount of money earned by each tech during the time period of the report you already sent and the reports that will be sent from the request above? We are trying to work on wages and this information is important to be able to come to an agreement that the techs can live with.
In addition, one of the company proposals references the HSP agreement with DTV. We'd like a copy of the agreement referenced in the proposal.

Also referenced in a proposal are performance standards utilized by the "Employers customer". We'd like to see the standards that DTV is asking you to meet. To be clear, not the metrics used by DSat derived *from* the standards set by the Employers customer, but the actual standards from DTV that DSat uses to form the scorecard metrics.

During bargaining Dan referenced a map with a radius for each tech. Can you provide an example (Map) that shows the radius of each tech and how it benefits the techs financially as per Dan?

In the Chicago South TOQ meeting Dan inadvertently showed a slide that talked about a bonus plan for senior techs (I believe it was for those with 10+ years) that is being rolled out in the market, but not in South Holland due to status Quo. Please provide info on that program so we can discuss.

Exhibit 12

Talking about status quo…I know you were looking for names of people that combine breaks & lunches to take a 60 minute lunch. The only names I have at the moment are REDACTED and naturally REDACTED I believe that there are a few more, but haven't talked to them to be sure. I've been told that the GM recently told them that it is no longer allowed. Once again it is illegal to begin enforcing rules that have not been enforced prior to certification & while I cannot recall exact names of people that have been doing it I know that it was being done when REDACTED was there and we were organizing as well as after certification. In talking to Kordel today he said that the number of people that do it is few, but with the busy schedule it was causing past dues and reschedules. I don't understand how management (above Kordel's level) can enforce status quo when it comes to the 10 Year bonus, but then ignore it when we get to enforcing rules that have not been enforced. Can we compromise by giving the South Holland techs the bonus given to everybody else in exchange for agreeing to the enforcement of the rule that has not been enforced until recently? We really should have had an agreement before Kordel was told to make the announcement.

Please provide the criteria used to determine the tech efficiency levels (i.e. what is used to determine tech efficiency where some are at a 1.4 rate vs. 1.0 or 1.6).

I'd like to see the Office scorecard that includes NPS and/or anything else that is different with Chicago South techs vs. the rest of the market for the past 4 quarters

Lastly, can you provide the completion percentage for Installs, Upgrades and Service calls respectively?

Thank you,

David E. Webster
Business Representative/Organizer
IBEW Local 21
630 222-9121

From: Lauren Dudley
Sent: Friday, December 04, 2015 2:59 PM
To: 'Dave Webster' <dwebster@ibew21.org>
Subject: RE: Information Request

Dave,
Per your requests, please see below and attached.

So you're aware, I'll be going out on maternity leave within the next week or so. In my absence, please filter any questions in regards to a members performance, employment or issues at the office through Kordell. Any requests similar to the below or in regards to negotiations should be directed to Eric Simon.

Please let me know if you have any questions.

Lauren Dudley, PHR
Human Resources Director
UniTek Global Services
2010 Renaissance Blvd.
King of Prussia, PA 19406
*** office: 267.464.2783 * fax: 267-401-1561 * cell: 610.930.3030 * email:** ldudley@unitekgs.com

From: Dave Webster [mailto:dwebster@ibew21.org]
Sent: Monday, November 23, 2015 2:55 PM
To: Lauren Dudley <LDudley@unitekgs.com>
Subject: RE: Information Request

Lauren,

Thank you for the info. However, I've noticed that there are some missing names from the Tech Detail report. It looks like they are guys on disability or some sort of leave at the time this report was run, which leads me to a question on that report…what time period is the report for? I'm guessing it was for one day, but I didn't see a way to tell for sure. If so, which day? If not what time period? In general, the tech detail report is generated bi-weekly (twice per week).

The names missing from the report are REDACTED Griffith. I know about all of them but REDACTED being out on leave for a period of time and I think all of them except REDACTED are back. Can you please run that report again (in a different time period) now that most have returned and if it IS only one day can you run a couple of days in different weeks so we can see the changes, please. See attached for week of 11/23 (only one report was generated for this week due to the holiday). Gregory Hickenbottom has been out on leave since 10/3/15.

Exhibit 13

Also, can you send me info on the amount of money earned by each tech during the time period of the report you already sent and the reports that will be sent from the request above? We are trying to work on wages and this information is important to be able to come to an agreement that the techs can live with. See attached

In addition, one of the company proposals references the HSP agreement with DTV. We'd like a copy of the agreement referenced in the proposal. See attached, relevant to scope of work

Also referenced in a proposal are performance standards utilized by the "Employers customer". We'd like to see the standards that DTV is asking you to meet. To be clear, not the metrics used by DSat derived *from* the standards set by the Employers customer, but the actual standards from DTV that DSat uses to form the scorecard metrics. Scorecard metrics for techs are decided and formed internally, not by DTV. Please refer to the tech Scorecard for the metrics and standards relevant to techs.

During bargaining Dan referenced a map with a radius for each tech. Can you provide an example (Map) that shows the radius of each tech and how it benefits the techs financially as per Dan? See attached map. A smaller radius means less drive time; less drive time between jobs is financially beneficial to techs in that they're spending more time on jobs, closing work, rather than driving.

In the Chicago South TOQ meeting Dan inadvertently showed a slide that talked about a bonus plan for senior techs (I believe it was for those with 10+ years) that is being rolled out in the market, but not in South Holland due to status Quo. Please provide info on that program so we can discuss.
10 Year Recognition Program – For all techs who have been with the Company for 10 years, without any gaps in employment:

- $1000 Net Payout
- Branded Shirt and Jacket
- $100 Visa Gift Card
- Scorecard – Never a Level 1, guarantee to move up a level
- Weekends Off – outside of weather issues or extremely high volume

Talking about status quo…I know you were looking for names of people that combine breaks & lunches to take a 60 minute lunch. The only names I have at the moment are REDACTED and naturally REDACTED. I believe that there are a few more, but haven't talked to them to be sure. I've been told that the GM recently told them that it is no longer allowed. Once again it is illegal to begin enforcing rules that have not been enforced prior to certification & while I cannot recall exact names of people that have been doing it I know that it was being done when REDACTED was there and we were organizing as well as after certification. In talking to Kordel today he said that the number of people that do it is few, but with the busy schedule it was causing past dues and reschedules. I don't understand how management (above Kordel's level) can enforce status quo when it comes to the 10 Year bonus, but then ignore it when we get to enforcing

rules that have not been enforced. Can we compromise by giving the South Holland techs the bonus given to everybody else in exchange for agreeing to the enforcement of the rule that has not been enforced until recently? We really should have had an agreement before Kordel was told to make the announcement. As I've already expressed, I don't believe it is common practice that employees take an hour lunch, nor has it consistently been done in the past under previous management; therefore there's been no change to working conditions. At this point, you haven't provided any details or facts that change the companies view on continuing to enforce this rule.

To your point, rolling out the 10 year bonus would be a change to working conditions which we will not implement without negotiating with the union, as required.

Please provide the criteria used to determine the tech efficiency levels (i.e. what is used to determine tech efficiency where some are at a 1.4 rate vs. 1.0 or 1.6).
Criteria used to determine:

- Expediency level of the technician (fast vs slow)
- Tenure of the technician
- Skill Set of the Technician in combination of the completion rate of the market. In other words, the rate in which jobs should book to keep techs productive.
- Amount of Backlog in the system
- Tech Service Role

I'd like to see the Office scorecard that includes NPS and/or anything else that is different with Chicago South techs vs. the rest of the market for the past 4 quarters
Attached is 2015 Q2, Q3 and Q4 to date. Anything further back will take time to generate as our analytics team was not tracking prior to Q2 of this year.. I'm hoping the attached is sufficient for your purposes.

Lastly, can you provide the completion percentage for Installs, Upgrades and Service calls respectively?

November	Work Order Type	Completion Rate
South Holland	Former Install	80.15%
South Holland	New Install	64.79%
South Holland	Service	67.72%
South Holland	Upgrade	78.41%

Thank you,

David E. Webster
Business Representative/Organizer

DIRECTV, LLC

2012 HOME SERVICES PROVIDER AGREEMENT

This Home Services Provider Agreement (including all Exhibits and Schedules hereto, this "Agreement") is entered into this fifteenth (15th) day of October, 2012 (the "Effective Date"), between **DIRECTV, LLC** (formerly DIRECTV, Inc.), a California limited liability company ("DIRECTV"), and **DirectSat USA, LLC** ("Contractor"). DIRECTV and Contractor may also be collectively referred to herein as the "Parties."

RECITALS

A. DIRECTV is a provider of direct broadcast satellite ("DBS") services to consumers which include video, audio, data and other programming delivered via specialized satellite receiving equipment.

B. DIRECTV is also engaged in the business of leasing/providing digital satellite system equipment consisting of a satellite antenna (including the LNB) and an integrated receiver/decoder (including a remote control) ("DIRECTV System"), which is compatible and fully operable with DIRECTV's DBS services.

C. In addition, Contractor is engaged in the business of installing, servicing and maintaining various consumer electronic products, including satellite systems.

[redacted]

NOW, THEREFORE , in consideration of the mutual covenants herein contained, the parties hereto agree as follows:

AGREEMENT

1. **Appointment of Contractor.**

a. Authority . DIRECTV hereby engages Contractor to provide services in the installation and maintenance of DIRECTV System Hardware (the "Services," or "Fulfillment Services" when referring specifically to initial customer installation services only) as defined herein and as identified in **Exhibit 1.a.i.** attached hereto for DIRECTV customers located in areas specified in **Exhibit 1.a.ii.**, attached hereto, [redacted]

EXHIBIT 1.a.i.

SERVICES/FULFILLMENT SERVICES

Fulfillment Services

- High Power residential installations, including retail sales agents, DIRECTV Direct Sales initiatives and fulfillment of other acquisition activities
- Multi-satellite residential installations including PARA TODOS, Local into Local and High Definition
- Wildblue
- Commercial customer installations (upon Contractor's applicable commercial certification by DIRECTV)
  Grade 1 - Capable of installing up to 4 or 8 IRDs in the same commercial establishment using one multiswitch
  Grade 2 - Capable of installing any number of IRDs in a commercial establishment using multiple multiswitches
  Grade 3 - Capable of building a headend in a commercial establishment that receives DIRECTV programming, converts it to a standard VHF/UHF channel frequency and distributes it to a "cable ready" TV set on a standard UHF/VHF distribution system.

Service Work

- Service Calls (including escalated Service Calls from other Contractors)
- Move/transfer installations
- DIRECTV System and other equipment pick-ups (disconnected and downgraded accounts)
- Additional outlet upgrades
- Relocates
- Multi-satellite upgrades
- High Definition ("HD") Antenna Installation

EXHIBIT La.ii.

FULFILLMENT SERVICE DMAS
(Pursuant to Contractor's Authorization under Section l(a) of the Agreement)

This or these DMAs or portions of DMAs are assigned to Contractor on a **non-exclusive** basis. Work Orders may also be provided to Contractor within zip codes adjacent to, but not within a DMA listed below. Contractor IS NOT AUTHORIZED TO CONDUCT FULFILLMENT OR OTHER SERVICES PURSUANT TO THIS AGREEMENT IN ANY DMAs NOT AUTHORIZED BY THIS CONTRACT OR UNLESS DIRECTED IN WRITING BY DIRECTV.

DMA Assignment

HARRISBURG PA
JOHNSTOWN PA
NEW YORK NY 3
PHILADELPHIA PA
WASHINGTON DC 2
BLUEFIELD VA WV
CHARLESTONHUNTINGTON WV
CHARLOTTESVILLE VA
CLARKSBURG WV
DAYTON OH
ERIE PA
FT WAYNE IN
HARRISONBURG VA
LIMA OH
PARKERSBURG OH
PITTSBURGH PA

ROANOKE VA
SOUTH BEND IN
TOLEDO OH
WHEELING WV
ZANESVILLE OH
CHICAGO IL
DULUTH MN
GREENBAY WI
LA CROSSE WI
MADISON WI
MANKATO MN
MARQUETTE MI
MILWAUKEE WI
MINNEAPOLIS MN
ROCHESTER MN
ROCKFORD IL
WAUSAU WI

[redacted]

Dave Webster

From: Dave Webster <dwebster@ibew21.org>
Sent: Tuesday, February 16, 2016 11:52 AM
To: 'SimonE@JacksonLewis.com'
Cc: Paul Wright (pwright@ibew21.org); Bill Henne (bhenne@ibew21.org); Michael Andel (mandel@ibew21.org); Orlando Urbina (orlando_urbina84@yahoo.com); 'josh bennett'
Subject: Information Request

Mr. Simon,
I have heard that AT&T has extended the DirecTV contract with DirectSat for another 3 years. With AT&T & DirectSat both installing the DirecTV Dish we need to understand the relationship between AT&T & DirectSat and the shared work. Please send a copy of the current agreement between DirectSat & AT&T/DTV for use in bargaining.

Regards,

David E. Webster
Business Representative/Organizer
IBEW Local 21
630 222-9121

Exhibit 14

Dave Webster

From: Simon, Eric P. (NYC) <SimonE@JacksonLewis.com>
Sent: Saturday, February 20, 2016 4:18 PM
To: Dave Webster
Cc: Bill Henne (bhenne@ibew21.org); dyannantuono@directsatusa.net
Subject: RE: Information Request

Mr. Webster:
We have no idea what you have heard or whom you have heard it from, but your "information" is erroneous. DirectSat has entered into no new agreements with AT&T. In early 2015, DirecTV extended its contract with DirectSat through 2018, but there has been nothing further.

As to the substance of your request, you seem to assert is relevant because you believe DirecTV (I assume you refer to AT&T because of the recent acquisition of DirecTV by AT&T) and DirectSat have "shared" work. Again, you are mistaken. There is no "shared" work. As far as DirectSat is concerned, all of the work is DirecTV's. DirecTV currently has, and always has had, the right to contract as much or as little or none of its satellite TV system installation and service work to DirectSat as it, in its sole discretion, may decide. DirectSat only performs the work that DirecTV authorizes it to perform. DirectSat has never had an exclusive right to install/service DirecTV systems. Just as DirecTV had the ability to decide to whom it would contract with or if it would contract out installation/service work at all prior to the AT&T-DirecTV merger, DirecTV (even as a subsidiary of AT&T) continues to determine what and how much work to contract out. This is not an issue DirectSat has any control over or ever had any control over, and as such is not a mandatory subject of bargaining. Bargaining unit work has been and will continue to be the installation and service of DirecTV systems to the extent and degree DirecTV authorizes DirectSat to perform such work. While Local 21 may have an issue with DirecTV's subcontracting of such work, it is not relevant to our negotiations.

Best Regards,

Eric P. Simon, Esq.
Principal
Jackson Lewis, P.C.
666 Third Avenue
New York, New York 10017
212-545-4014| Direct
212-972-3213| Fax
646-942-7476| Cell

simone@jacksonlewis.com

www.jacksonlewis.com

Exhibit 15

From: Dave Webster <dwebster@ibew21.org>
Sent: Friday, March 18, 2016 12:09 PM
To: Simon, Eric P. (NYC)
Subject: DSat Bargaining 3/22/16
Attachments: DSat Contractor Percentages.pdf

Mr. Simon,

To prepare for our next bargaining session I thought it might be worthwhile to highlight the key unresolved issues. As I see it the KEY issues are Wages, Benefits and New Product Lines. The last proposals on wages and benefits were passed by the union and the last New Product Line proposal was passed by the company.

I would also like to request information and relevant documents to show how the technician's scorecard is determined. Not only the metrics, but how the metrics are determined and by whom. Technicians have been told in the past by Jeff Jamison that the scorecard is decided and controlled by DirecTV and I have been told by the company that the scorecard is decided and formed internally not by DirecTV.

The union requests a FULL copy of the HSP agreement between DirectSat & DirecTV particularly because of the reference n the New Product Lines proposal.

Lastly, please see the attached and provide updated data as close to current date as possible.

Regards,

David E. Webster
Business Representative/Organizer
IBEW Local 21
630 222-9121

Exhibit 16

Union Counter to Company Proposal no. 78
03/22/16

NEW PRODUCT LINES

In the event the Employer is engaged with respect to products or services other than ***those provided pursuant to its Home Service Provider agreement with DirecTV,*** including the installation and servicing of satellite based television services and various consumer electronic products, such work shall ~~not~~ be deemed bargaining unit work, if such work is assigned anywhere in the IL01 service area. If ~~however, in the sole and exclusive discretion of the Employer,~~ the Employer ~~shall~~ elects to assign work regarding such new product lines within IL01, the Employer shall determine the number of employees to be assigned to such work, the locations in which such work shall be assigned to employees and the skills and abilities required of employees to be assigned to such work. ~~and the wage scales applicable to such work~~. Wage scales applicable to such work will be negotiated with the Union. Once assigned ~~to bargaining unit Personnel~~ however, work involving new product lines and/or services may be removed by the Employer from the bargaining unit and such decision shall not be subject to grievance and arbitration, provided such work is removed from ~~all facilities in~~ the IL01 service area. ~~Chicago DMA~~. Upon request by the Union, the Employer shall meet and discuss the terms and conditions of work related to such new product lines and/or services. Any agreement reached by the parties shall be reduced to writing and made a part of this Agreement. However, in the event the parties are unable to reach an agreement regarding such new product lines or services, such disagreements shall ~~not~~ be subject to the grievance and arbitration provisions of this Agreement ~~nor release the Union or employees from the no-strike provisions of this agreement~~.

Exhibit 17

Dave Webster

From: Dave Webster <dwebster@ibew21.org>
Sent: Tuesday, April 05, 2016 6:30 PM
To: 'Simon, Eric P. (NYC)'
Subject: RE: DirectSat's proposals presented 3.22.16

Mr. Simon,

Thank you for the proposals. Can you tell me when to expect the information requested? See Below:

I would also like to request **information and relevant documents to show how the technician's scorecard is determined Not only the metrics, but how the metrics are determined and by whom**. Technicians have been told in the past by Jeff Jamison that the scorecard is decided and controlled by DirecTV and I have been told by the company that the scorecard is decided and formed internally not by DirecTV

The union requests a FULL copy of the HSP agreement between DirectSat & DirecTV particularly because of the reference n the New Product Lines proposal.

Lastly, we would like to know the number of jobs done since certification **installing and/or maintaining Wild Blue Services and Hughes net services.**

I bolded the portions that may have been unclear.

David E. Webster
Business Representative/Organizer
IBEW Local 21
630 222-9121

From: Simon, Eric P. (NYC) [mailto:SimonE@JacksonLewis.com]
Sent: Monday, April 04, 2016 5:06 PM
To: Dave Webster <dwebster@ibew21.org>
Cc: Lauren Dudley (ldudley@unitekgs.com) <ldudley@unitekgs.com>
Subject: DirectSat's proposals presented 3.22.16

Dave—per your request, attached are "Word" versions of the proposals we presented on 3/22. Proposal No. 86 contains the oral modification we made to this proposal at the table.

Eric P. Simon, Esq.

Exhibit 18

Principal
Jackson Lewis, P.C.
666 Third Avenue
New York, New York 10017
212-545-4014| Direct
212-972-3213| Fax
646-942-7476| Cell

simone@jacksonlewis.com

www.jacksonlewis.com

Representing management exclusively in workplace law and related litigation

From: Simon, Eric P. (NYC)
Sent: Wednesday, April 06, 2016 5:39 PM
To: Dave Webster
Cc: Lauren Dudley (ldudley@unitekgs.com); dyannantuono@directsatusa.net
Subject: DTV Performance Metrics
Attachments: Metrics_HSP Agreement.pdf

Mr. Webster: attached per your request are the current metrics established by DirecTV to measure the performance of DirectSat.

Eric P. Simon, Esq.
Principal
Jackson Lewis, P.C.
666 Third Avenue
New York, New York 10017
212-545-4014| Direct
212-972-3213| Fax
646-942-7476| Cell

simone@jacksonlewis.com

www.jacksonlewis.com

Exhibit 19

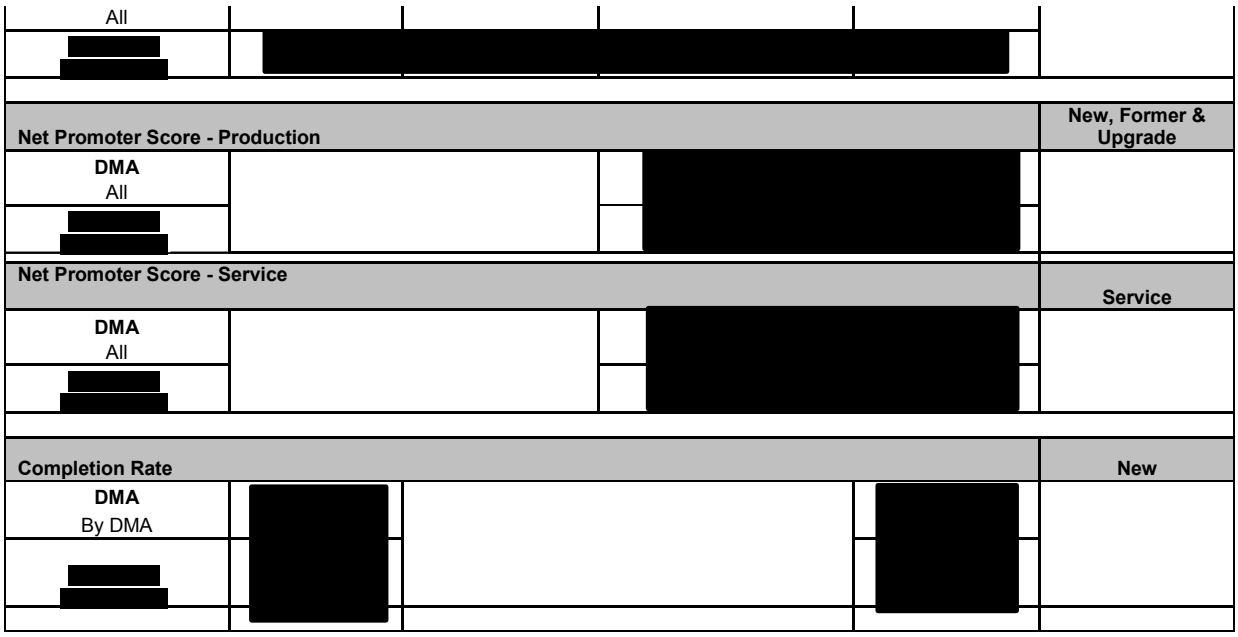
SEVENTH AMENDMENT TO THAT 2012 HOME SERVICES PROVIDER AGREEMENT

This Seventh Amendment (this "Seventh Amendment") to that certain DIRECTV, Inc. 2012 Home Services Provider Agreement dated October 15, 2012 (the "Agreement") by and between **DirectSat USA, LLC ("Contractor")**, and **DIRECTV, LLC** ("**DIRECTV**"), is hereby made and entered into this first (1st) day of January, 2016 (the "Seventh Amendment Effective Date"), as follows:

EXHIBIT 3.e.(v)

PERFORMANCE STANDARDS: [redacted]

[redacted]	Work Order Type eligible for calculation
Install Service within 30 Days (I30 – Opened)	**New, Former, Upgrade**
DMA All	
[redacted]	
Repair Service within 30 Days (R30 – Opened)	**Service**
DMA All	
[redacted]	
CCK Take Rate Percentage	**Eligible Activities w/ a closed CCK- All WOs**
DMA All	
[redacted]	
Average Days to First Available Production	**New, Former & Upgrade**
DMA All	
[redacted]	
Average Days to First Available Service	**Service**
DMA All	
[redacted]	
Equipment Return Rate	**IRD Returns**
DMA All	
[redacted]	
Appointment Success	**New, Former, Upgrade, & Service**
DMA All	
[redacted]	
Post Call Index Score	**New, Former, Upgrade, & Service**
DMA	
[redacted]	



Definitions and calculations:

Install Service within 30 Days (I30 – Opened) shall mean the created service call percentage within thirty days of a prior closed residential truck roll activity. Residential closed activity includes the following work order types: New Install *I* Former Customer Installs *I* Upgrades, calculated monthly.

Total created residential service activities from the 1st day of last month through the last day of last month DIVIDED BY total closed residential activities last month

Repair Service within 30 Days (R30 – Opened) shall mean the created service call percentage within thirty days of a prior closed residential truck roll activity. Residential closed activity includes **the following work order types: Service, calculated monthly.**

Total created residential service activities from the 1st day of last month through the last day of last month DIVIDED BY total closed residential activities last month

CCK Take Rate Percentage shall mean the percentage of account level broadband DECAs calculated as added on eligible activities closed with a Broadband Eligible Order Line Item within a month. DIRECTV's report shall be pulled on the eighth day of each month for the prior month's activity. Eligibility for incentive requires a 90% or better CCK Return Path Rate (CCK RPR) at the DMA level. A successful CCK callback requires two pings to register within 7 days of work order closure along with a closed Broadband Eligible OLI and Closed DECA (internal, wired, or external wireless). Chargeback will be determined based on CCK RPR only, not CCK take rate. Individual DMA take rate goals will be set based on 2014 performance and company goals.
Added DECAs on eligible closed work orders DIVIDED BY total broadband eligible order line items on eligible closed work orders

Average Days To First Available - Production shall mean the average number of days to first available date on all created New Installation, Former, and Upgrade activities within a month. The first available date refers to the first date within the scheduling tool that is available for a customer to select.
Total number of days from activity created date to first available date for New Installation, Former and Upgrade activities DIVIDED BY the total number of Created New Installation, Former & Upgrade activities

Average Days To First Available - Service shall mean the average number of days to first available date on all created Service activities within a month. The first available date refers to the first date within the scheduling tool that is available for a customer to select.
Total number of days from activity created date to first available date for Service activities DIVIDED BY the total number of Created Service activities

Equipment Return Rate shall mean non-scrapped, advanced product receivers returned to DIRECTV Repair facilities from equipment swap replacements in the field on service call and upgrade work order types. This is measured 45 days after the last day of the month in which the swap is recorded (equipment returns subsequent to the applicable return period will not be reconciled). Each returned IRD is validated by CAM ID and serial number.
Received Advanced IRDs DIVIDED BY Swapped & Replaced Advanced IRDs

Appointment Success shall mean the percentage of all closed activities in which the technician (i) arrived within the appointment window, (ii) had no prior negative reschedule activity, or (iii) had no "Where's My Tech" Field Service Requests. This includes New Installs, Former Installs, Upgrades, & Service.
Total number of successful appointments met on closed activities DIVIDED BY the total number of closed activities.

Post Call Index Score shall mean the score as determined by DIRECTV's third-party vendor outbound surveys.
Sum of Index Scores DIVIDED BY Number of Surveys

Net Promoter Score - Production shall mean the percentage equal to the number of customers who would recommend DIRECTV (promoters) minus the number of customers who would not recommend DIRECTV (detractors) divided by the total number of respondents. Promoters are considered those individuals who answer with a score of 9 or 10, detractors 1-6. This calculation is based on eligible closed new installations, former, and upgrade activities.
(# of Promoters - # of Detractors) DIVIDED BY # of Respondents

Net Promoter Score - Service shall mean the percentage equal to the number of customers who would recommend DIRECTV (promoters) minus the number of customers who would not recommend DIRECTV (detractors) divided by the total number of respondents. Promoters are considered those individuals who answer with a score of 9 or 10, detractors 1-6. This calculation is based on eligible service activities.
(# of Promoters - # of Detractors) DIVIDED BY # of Respondents

Completion Rate shall mean completed New Install Work Order activities as a percentage of all Completed and Canceled New Install activities (excluding Administrative cancels as determined by DIRECTV), calculated monthly. DIRECTV's report shall be pulled on the eighth day of each month for the prior month's activity.
Total Closed New Install activities DIVIDED BY the sum of total Closed New Install activities and total Controllable Cancels

From: Dave Webster [mailto:dwebster@ibew21.org]
Sent: Thursday, May 19, 2016 9:31 AM
To: Simon, Eric P. (NYC)
Subject: Bargaining info

Mr. Simon,

In connection with DirectSat negotiations I renew my request for a FULL copy of the HSP agreement between DirectSat and DirecTV/AT&T in addition to all current agreements with sub contractors, to evaluate the extent of control of DirectSat by DirecTV/AT&T.

Dave Webster
Business Rep/Organizer
IBEW Local Union 21
630 222-9121

Exhibit 20

Simon, Eric P. (NYC)

From: Simon, Eric P. (NYC)
Sent: Thursday, May 19, 2016 10:28 AM
To: Dave Webster
Subject: RE: Bargaining info

Dear Mr Webster: We have already provided you with all relevant information regarding this request. We see no reason to supplement our response.

Eric P. Simon, Esq.
Principal
Jackson Lewis, P.C.
666 Third Avenue
New York, New York 10017
212-545-4014| Direct
212-972-3213| Fax
646-942-7476| Cell

simone@jacksonlewis.com

www.jacksonlewis.com

From: Dave Webster [mailto:dwebster@ibew21.org]
Sent: Thursday, May 19, 2016 9:31 AM
To: Simon, Eric P. (NYC)
Subject: Bargaining info

Mr. Simon,

In connection with DirectSat negotiations I renew my request for a FULL copy of the HSP agreement between DirectSat and DirecTV/AT&T in addition to all current agreements with sub contractors, to evaluate the extent of control of DirectSat by DirecTV/AT&T.

Dave Webster
Business Rep/Organizer
IBEW Local Union 21
630 222-9121

Exhibit 21

jackson|lewis
Attorneys at Law

Representing Management Exclusively in Workplace Law and Related Litigation

Jackson Lewis P.C.
666 Third Avenue
New York, New York 10017
Tel 212 545-4000
Fax 212 972-3213
www.jacksonlewis.com

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CHICAGO, IL	LAS VEGAS, NV	ORLANDO, FL	SAN JUAN, PR
CINCINNATI, OH	LONG ISLAND, NY	PHILADELPHIA, PA	SEATTLE, WA
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*through an affiliation with Jackson Lewis P.C., a Law Corporation

MY DIRECT DIAL IS: (212) 545-4014
MY EMAIL ADDRESS IS: SIMONE@JACKSONLEWIS.COM

May 23, 2016

VIA FACSIMILE (630-960-9607)

Mr. David Webster
Business Representative
Local 21, IBEW
1307 Butterfield Road, Suite 422
Downers Grove, Illinois 60515-5606

Re: IBEW :Local 21/May 19, 2016 Request for Copy of Contract between DirecTV and DirectSat

Dear Mr. Webster:

I want to take this opportunity to further explicate DirectSat's rational for declining to provide a complete copy of the HSP agreement between DirecTV and DirectSat (the "HSP Agreement").

Local 21, IBEW initially requested a copy of the HSP agreement via email dated November 23, 2016. The purported justification for the request was "…one of the company's proposal references the HSP agreement with DTV. We'd like a copy of the agreement referenced in the proposal." It was our understanding the request referred to DirectSat proposal No.78 dated November 4, 2015 entitled ***"New Product Lines" and which referenced the treatment of "products of services other than those provided pursuant to [DirectSat's] Home Service Provider agreement with DirecTV…"*** (emphasis in original). On November 23, 2015, Lauren Dudley responded with those portions of the HSP agreement delineating services provided by DirectSat pursuant to the HSP agreement.

On April 5, 2016 you again requested a full copy of the HSP agreement "particularly because of the referenced n[sic] the New Products Lines Proposal." Having already provided relevant information no further response was made.

On May 19, 2016 you again requested a full copy of the HSP agreement as well as "current agreements with subcontractors." This time however, the ostensible reason for this request was "to evaluate the extent of control of DirectSat by DirecTV/AT&T."

The request for the full copy of the HSP agreement to evaluate DirecTV's control over DirectSat is irrelevant to negotiations between DirectSat and Local 21 regarding terms and conditions of

Exhibit 22

jackson lewis
Attorneys at Law

employment of DirectSat employees. The "extent of control" of DirecTV over DirectSat has no bearing on negotiations over wages, hours, or other terms and conditions of employment which are exclusively controlled by DirectSat. As previously explained to you at the table, DirecTV does not, and has no control over the wages paid to DirectSat employees or the metrics used to evaluate the performance of unit employees. These decisions are vested exclusively in DirectSat. For the last 2+ years since Local 21 was certified as the representative of employees of DirectSat's Chicago South (now South Holland location), DirectSat has bargained in good faith over the wages, hours and other terms and conditions of employment of unit employees. DirecTV has no role in these negotiations. DirectSat has never asserted that it cannot agree to a proposal on any issue because DirecTV might disapprove. Nor is the ability of DirectSat to enter into a collective bargaining agreement with Local 21 subject to approval by DirecTV.

DirectSat has provided Local 21 with those portions of its contract with DirecTV which may have some relevance to our negotiations – the scope of work covered by the HSP agreement and the metrics used by DirecTV to evaluate the performance of DirectSat under the HSP agreement. (DirectSat did not object to providing this information on the basis that while DirectSat has full authority to set performance metrics for unit technicians, DirectSat has stated that the metrics established by DirecTV to evaluate DirectSat help inform DirectSat in establishing performance metrics for technicians.)

For all the foregoing reasons, the Union's request for the full HSP contract is not relevant to any issue in negotiations and DirectSat declines to provide it.

Very truly yours,

JACKSON LEWIS P.C.

Eric P. Simon

EPS/rg

cc: Dan Yannantuono
Lauren Dudley

4841-1857-6690, v. 1

United States Government

NATIONAL LABOR RELATIONS BOARD

Division of Judges

1015 HALF STREET, SE, Suite 6034

Washington, DC 20570-0001

May 5, 2017

Douglas J. Klein, Esq.
Jackson Lewis P.C.
666 Third Avenue
New York, NY 10017

Re: DirectSat USA, LLC
13-CA-176621

Pursuant to your request on behalf of counsel for the Respondent for an extension of time for filing briefs, time is hereby extended to May 26, 2017

Sincerely,

Arthur Amchan
Deputy Administrative Law Judge

CC: Douglas.Klein@jacksonlewis.com
Elizabeth.Cortex@nlrb.gov.

United States Government

NATIONAL LABOR RELATIONS BOARD

Division of Judges

1015 HALF STREET, SE, Suite 6034

Washington, DC 20570-0001

May 5, 2017

Douglas J. Klein, Esq.
Jackson Lewis P.C.
666 Third Avenue
New York, NY 10017

Re: DirectSat USA, LLC
13-CA-176621

Pursuant to your request on behalf of counsel for the Respondent for an extension of time for filing briefs, time is hereby extended to May 26, 2017

Sincerely,

Arthur Amchan
Deputy Administrative Law Judge

CC: Douglas.Klein@jacksonlewis.com
Elizabeth.Cortex@nlrb.gov.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

DIRECTSAT USA, LLC	)	
	)	
Respondent	)	
	)	
and	)	Case No. 13-CA-176621
	)	
IBEW, LOCAL 21	)	
	)	
Charging Party	)	

CHARGING PARTY'S BRIEF IN SUPPORT OF THE UNFAIR LABOR PRACTICE COMPLAINT

GILBERT A. CORNFIELD, ESQ.
CORNFIELD AND FELDMAN LLP
25 East Washington Street
Suite 1400
Chicago, IL 60602-1803
Phone: (312) 236-7800
Fax: (312) 236-6686

May 25, 2017

Attorneys for Charging Party

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

DIRECTSAT USA, LLC	)	
	)	
Respondent	)	
	)	
and	)	Case No. 13-CA-176621
	)	
IBEW, LOCAL 21	)	
	)	
Charging Party	)	

CHARGING PARTY'S BRIEF IN SUPPORT OF THE UNFAIR LABOR PRACTICE COMPLAINT

Pursuant to the directions of the Administrative Law Judge (ALJ), IBEW, Local 21, the "Charging Party" or "Union" submits its Brief in support of the subject unfair labor practice Complaint

STATEMENT OF THE CASE

The Union is the certified bargaining representative for a group of technicians employed by DirectSat USA, LLC (the "Employer") within a suburban area of the Chicago Metropolitan

Area The Union was certified by the National Labor Relations Board (the "Board") for the group in 2014 Since the certification the Employer and the Union have not successfully completed negotiations for a first collective bargaining agreement

DirectSat's primary work is to install and service satellite TV systems for DirectTV During the course of negotiations AT&T acquired ownership of DirecTV In November, 2015 the Union negotiator and representative requested the DirectSat representative to provide the Union with a copy of the agreement between DirectSat and DirecTV The Employer responded by providing the Union with 3 redacted pages from the agreement which is incorporated into the subject Stipulation as part of Exhibit 13 The redacted sections of the agreement describe the categories of DirecTV installations and servicing work within designated geographic areas, including "Chicago Il " The redacted and partial document bears the "Effective Date" of October 15, 2012

In February, 2016 the Union requested that the Employer provide " a copy of the current agreement between DirectSat & AT&T/DTV for use in bargaining " (Exhibit 14) The Employer responded that in " early 2015, DirecTV extended its contract with DirectSat through 2018, but there has been nothing further " The Employer refused to comply with the Union's request for a copy of the DirecTV-DirectSat agreement on the basis that it is not relevant to the collective bargaining negotiations between the

Employer and the Union. (Exhibit 15)

In March, 2016 the Union renewed the request for " a full copy of the HSP agreement between DirectSat & DirecTV " (Exhibit 16) The Employer refused to comply with the Union's request for a "full copy" and that the Employer had already provided the Union with the relevant portions of the HSP Agreement " (Exhibit 17) In April and May, 2016 the Union repeated its requests for the full agreement with the Employer responding with the same position. (Exhibits 18, 19, 20 and 21)

During the course of the above cited exchanges in April,2016 the Employer provided the Union with a redacted copy of a Supplemental Amendment to the 2012 agreement with DirecTV, entered into in January, 2016 The document is included in Exhibit 19 The document lists and defines the services provided by DirectSat for DirecTV with performance standards depending apparently on the length of time to perform and the quality of the services However, except for the identification of the various services, the actual standards and all other information has been redacted.

Following the above cited exchanges between the parties in May, 2016 the Union filed the instant unfair labor practice Charge alleging that the Employer was in violation of Sections 8(a)(1)and (5) of the Act by not furnishing the full copy of the agreement between DirectSat and DirecTV (AT&T) In September, 2016

the Acting Regional Director for the 13th Region, NLRB issued the subject Complaint.

The Employer filed its Answer to the Complaint in October, 2016. The Employer does not dispute the events which are alleged in the Complaint but denies that the events establish that the Employer is in violation of the Act and as an additional defense that the unfair labor practice Charge filed by the Union was not within the 6 months statute of limitations for filing a charge because the Union first requested a copy of the DirectSat-DirecTV agreement on November 23, 2015 and the Employer refused to furnish a complete copy at that time.

REASONS WHY THE AGREEMENT BETWEEN DIRECTSAT AND DIRECTV (AT&T) IS RELEVANT TO THE UNION'S REPRESENTATION OF THE BARGAINING UNIT.

The Employer has refused to provide a copy of the agreement with DirecTV on the basis that the contents of the document are not relevant to the Union's representation rights Since the work performed by members of the Union's bargaining unit is pursuant to and dependent upon the agreement, it is self-evident that the standards and conditions contained in the document are relevant to the working conditions of the employees represented by the Union. Nevertheless, we will identify the specific reasons why the document is essential to the Union's ability to negotiate the terms and conditions of employment for members of the

bargaining unit.

The New Product Lines Proposals

On November 4, 2015 the Employer advanced a proposal in the negotiations with the Union titled "New Product Lines" The proposal stated that should the Employer engage in products or services " other than those *provided pursuant to its Home Service Provider agreement with DirecTV.* such work shall not be deemed bargaining unit work." (Exhibit 11) On November 23, 2015 the Union by letter requested a copy of the agreement since " one of the company proposals references the HSP agreement with DTV " (Exhibit 12) On December 4, 2015 in response to the Union's request, the Employer provided only 3 pages of the agreement with substantial redactions. Thus, the starting point of the Union's request for a copy of the DirecTV agreement was in response to the Employer's proposal that the Union would waive representation rights for any technician work that the Employer may undertake beyond the work set forth in the agreement.

How A Technician's Earnings Are Determined

The bases for determining a technician's earnings was a significant subject addressed in the negotiations The November

23, 2015 letter from the Union to the Employer primarily sought information as to how the earnings of the technicians were determined by the Employer. The letter reflects the fact that the technicians do not simply earn an hourly wage but their earnings are based upon the work they perform; i e., they are paid as "piece workers." Presumably the amount a technician earns is based upon the work the technician performs, the quality of the work and the amount of time to complete tasks. The Union's requests for information regarding the standards used for compensating the technicians has been related to the DirecTV agreement. In the Union's letter of November 23, 2015 to DirectSat management the Union stated:

> "Also referenced in a proposal are performance standards utilized by the 'Employer[']s customer' We'd like to see the standards that DTV is asking you to meet To be clear, not the metrics used by DSat derived *from* the standards set by the Employer[']s customer, but the actual standards from DTV that DSat uses to form the scorecard metrics." (Exhibit 12)

The Union renewed the request for the full " .HSP agreement between DirectSat & DirecTV on March 18, 2016 before the next negotiation session between the parties. The Union stated in the letter to the Employer's chief negotiator that " information and relevant documents" [were required in order] to show how the

technician's scorecard is determined. Not only the metrics, but how the metrics are determined and by whom. Technicians have been told in the past by Jeff Jamison that the scorecard is decided and controlled by DirecTV and I have been told by the company that the scorecard is decided and formed internally not by DirecTV " (Exhibit 16) The same request was advanced for the same reasons by the Union by letter to the Employer's chief negotiator on April 5, 2016. (Exhibit 18)

On April 6, 2016 the Employer responded to the Union's request with a heavily redacted document noted above in evidence as part of Exhibit 19.

The Union repeated the same request by letter on May 19, 2016. The Employer responded with the statement "We have already provided you with all relevant information regarding this request. We see no reason to supplement our response." (Exhibits 20 and 21) The Employer supplemented their response on May 23, 2016 by letter to the Union asserting, in part, "The 'extent of control' of DirecTV over DirectSat has no bearing on negotiations over wages, hours, or other conditions of employment which are exclusively controlled by DirectSat." (Exhibit 22)

The Possible Joint Employer Status of DirectSat And DirecTV

While the Union was continuing to request a copy of the

full agreement between DirectSat and DirecTV, the Union was made aware that the issue of whether DirectSat and DirecTV were joint employers under the Fair Labor Standards Act (FLSA) was being litigated in the federal courts The most recent decision with respect to that issue is the decision of the United States Court of Appeals for the Fourth Circuit in *MARLON HALL; JOHN WOOD; ALIX PIERRE; KASHI WALKER and JOHN ALBRECHT v. DIRECTV, INC.; DIRECTV; DTV HOME SERVICES II, LLC* combined with *JAY LEWIS; KELTON SHAW; MANUEL GARCIA; and JUNE LEFTWICH v. DIRECTV, LLC; DIRECTSAT USA, LLC and DIRECTTV, INC.* , Case Nos 15-1857 and 15-1858 (2017) A copy of said decision is attached hereto as "Attachment 1"

The Union is not requesting the ALJ to decide the joint employer status Rather, we request that the ALJ take judicial notice of the Fourth Circuit Court of Appeals decision as part of the reasons why the Union has sought to obtain a full copy of the DirectSat and DirecTV agreement in order to evaluate whether DirecTV is a joint employer and therefore to be a participant in the negotiations for a collective bargaining agreement covering the Union's bargaining unit

Note that on pages 6 and 7 of the Fourth Circuit's decision, the plaintiffs are identified as technicians employees of DirectSat or for subcontractors of DirectSat On page 15 of the decision the Court states that under the FLSA " 'joint employment' exists when 'employment by one employer is not

completely disassociated from employment by the other employer[s] " On pages 30-31 the Court noted that " according to the Complaint, DIRECTV and DirectSat allocated, through provider *agreement with one another* and with subcontractors in the Provider Network, the authority to direct, control and supervise nearly every aspect of Plaintiffs' day-to-day job duties " The Court then went on to describe in more specific detail how DIRECTTV controls the scheduling and the " methods and standards of installation" of the technicians as well as identifying the technicians as DIRECTV representatives to the public. On page 32 of the decision the Court further noted that the " provider agreement determine whether work performed by DIRECTV technicians, including Plaintiffs, was 'compensable' or 'noncompensable. " pursuant to a "piece-rate system."

PRECEDENTS SUPPORT THE UNION'S RIGHT TO A FULL COPY OF THE DIRECTSAT AND DIRECTV AGREEMENT.

In *National Labor Relations Board v. Acme Industrial Co.*, 385 U S 432 (1967), the Supreme Court of the United States reaffirmed " the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties " The Supreme Court cited its prior decisions in *National Labor Relations Board v. Truitt Mfg. Co.*, 351 U S 149 (1956), 385 U S. 435-436 *Truitt Manufacturing*

centered on a union's right to relevant information possessed by the employer during the negotiations for a collective bargaining agreement, as in the subject litigation. In *Acme*, the employer unsuccessfully contended that the obligation to provide information to the bargaining representative should not extend to a dispute under the terms of a bargaining agreement to be submitted to binding arbitration.

In *NLRB v. New England Newspapers*, 856 F 2d 409 (CA 1, 1988), the United States Court of Appeals for the First Circuit in reliance upon the above cited Supreme Court decisions extended the employer's obligation to provide a copy of a sales agreement to the union representative of the employees In *New England Newspapers*, the employer had sold its business to another enterprise The First Circuit reasoned that although the employer was not obligated to negotiate with the union over the sale, the employer was required to bargain over the effects of the sale on the employees represented by the union. The First Circuit then addressed the issue of whether the union was entitled to a copy of the sales agreement in order to effectively represent the employees in the effects bargaining The Court then reviewed precedents which have held that a union's right to information from an employer must be balanced against an employer's proprietary rights and interests, citing *Ford Motor Co. v. N.L.R.B.*, 441 U S 488 (1979) The Court concluded that since the sales agreement has direct impact upon the

terms and conditions of employment for members of the union's bargaining unit, the agreement must be provided to the union. The Court then rejected the employer's argument that the agreement was not "relevant" to the union's right to negotiate over the effects of the sale. Relying upon the Supreme Court's decision in *Acme Industrial*, *supra*, the First Circuit held that the standard for requiring disclosure of information by the employer is whether there is a "probability" that the information is relevant to a union's representation rights.

The Employer's position in the subject proceeding that the full agreement with DirecTV is not relevant to the Union's negotiating rights must be rejected. The stipulations and exhibits demonstrate that the technicians represented by the Union are compensated in accordance with work assigned by DirecTV to DirectSat and standards established by DirecTV. The redacted parts of the agreement provided by the Employer to the Union establish that the standards set by DirecTV are contained in the agreement.

Furthermore, the Union is entitled to the agreement between DirecTV and DirectSat in order to determine whether the two entities are in fact joint employers and therefore jointly obligated to negotiate with the Union over the terms of a collective bargaining agreement. "Joint-employer" relationships under the NLRA does not require common ownership. It is sufficient that " one entity effectively and actively participates in the

control of labor relations and working conditions of employees of the second entity." *The Developing Labor Law* (Sixth Edition Vol II, ABA Section of Labor and Employment Law), pages 2366-2367 In the 2016 Supplement to *The Developing Labor Law* on page 27-7 the editors updated the NLRB's current position regarding joint employers stating: "In *Browning-Ferris Industries of California*, 362 NLRB No. 186 (2015), the Board restated the joint-employer standard by affirming the traditional test articulated by the Third Circuit in *Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117 (CA 3, 1982), enforcing 259 NLRB 148 (1981) -that two or more entities are joint employers if both are deemed employers under common law and they 'share or codetermine those matters governing the essential terms and conditions of employment."

THE EMPLOYER'S DEFENSE THAT THE UNFAIR LABOR PRACTICE CHARGE WAS TIME BARRED MUST BE REJECTED.

The Employer has raised as "A First Defense" that the subject unfair labor practice Charge was time barred because " on November 23, 2015, Respondent refused to provide a complete copy at that time, and more than six (6) months elapsed before the instant charge was filed with the Board."

It is evident from the Stipulation of Facts and Exhibits that the contents of the agreement between DirectSat and DirecTV was an ongoing subject of the negotiations between the parties

until the May 13, 2016 letter from the Employer's counsel to the Union's negotiator that the Employer will not provide any more of the contents of the agreement other than the redacted documents supplied to the Union on December 4, 2015 and April 6, 2016 The unfair labor practice Charge was filed on May 20, 2016 We note that in the Employer counsel's letter of May 23, 2016 that he refers to the fact that the Union based the demand for the complete agreement upon the additional need to " evaluate the extent of control of DirectSat by DirecTV/AT&T " (Exhibit 22)

In *New York Presbyterian Hospital*, 354 NLRB No 5 (2009), the NLRB stated that the test of whether a union's information request is time barred does not run from the date that the information was requested but " from the date that employer unequivocally refused to provide that information."

The Union's requests for copies of the DirectSat-DirecTV agreement was part of the dynamics of the negotiations which followed the Board's certification of the Union and the negotiating sessions from late 2015 through mid-2016 The Union's first request was in response to the Employer's referencing the agreement in the proposals relating to the scope of bargaining unit work in the future Later in the negotiations the terms of the agreement related to negotiations over the standards for determining the wages of members of the Union's bargaining unit The Employer's responses to the Union's requests were to provide the Union only

with heavily redacted parts of the agreement Then, after the Union became aware of the ongoing federal court litigation over whether DirectSat and DirecTV AT&T were joint employers under the FLSA, the Union renewed the requests for the full agreement citing the additional reason to determine whether the joint employer status applied to the subject contract negotiations

CONCLUSION

The Union therefore supports the General Counsel's position that the subject unfair labor practice Complaint be sustained in its entirety with an appropriate Order directing the Employer to provide the Union with the full copy of the current agreement between DirectSat and DirecTV AT&T

Respectfully submitted,

CORNFIELD AND FELDMAN LLP

May 25, 2017

BY: _____
GILBERT A. CORNFIELD

Attorneys for Charging Party

25 East Washington Street
Suite 1400
Chicago, IL 60602-1803
Phone: (312) 236-7800
Fax: (312) 236-6686

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MARLON HALL; JOHN WOOD; ALIX PIERRE; KASHI WALKER, Plaintiffs - Appellants, and JOHN ALBRECHT, Plaintiff, v. DIRECTV, LLC; DIRECTSAT USA, LLC, Defendants — Appellees, and DIRECTV, INC.; DIRECTV HOME SERVICES; DTV HOME SERVICES II, LLC, Defendants. JAY LEWIS; KELTON SHAW; MANUEL GARCIA, Plaintiffs — Appellants, and JUNE LEFTWICH, Plaintiff, v. DIRECTV, LLC; DIRECTSAT USA, LLC, Defendants — Appellees, and DIRECTV, INC., Defendant.

No. 15-1857 No. 15-1858

October 27, 2016, Argued January 25, 2017, Decided

BNA Headnotes

WAGES AND HOURS

FAIR LABOR STANDARDS ACT

[1] Joint employers — Intermediary entities — Subcontractors ▶101.2003 [Show Topic Path]

Satellite television installation technicians may pursue claim for unpaid overtime against satellite television provider as joint employer with intermediary entities, where—in consideration of non-exhaustive six–factor test to determine whether putative employers co-determine essential terms and conditions of employees' work—technicians alleged that (1) provider was principal client of intermediaries and often infused capital into them, (2) agreements allocated authority to provider to direct, control, and supervise most aspects of technicians' day-to-day job duties such as work schedules and assignments, (2) provider agreements with intermediaries required technicians to hold themselves out as representatives of provider, (3) provider set forth hiring criteria and ceased to assign work to discharged technicians, (4) provider determined whether or not technicians' work was compensable, and (5) provider imposed chargebacks on pay if it determined technicians' work was unsatisfactory.

[2] Employees — Independent contractors — Economic realities test ▶101.1603 [Show Topic Path]

Satellite television installation technicians may establish that they were employees of both satellite television provider and intermediary entities, where—applying economic realities test after finding

tabbies "ATTACHMENT 1"

provider and intermediaries may be joint employers—technicians alleged that provider determined hiring and compensation of technicians, provider furnished installation materials, provider dictated technicians' work schedules and required technicians to hold themselves out as representatives of provider, technicians' work installing provider's products was integral to provider's business, and intermediaries were responsible for implementing and enforcing provider's mandates for technicians.

[3] Overtime — Pleading ▶136.1103 ▶510.3202 ▶510.66 [Show Topic Path]

Satellite television installation technicians sufficiently stated claim for unpaid overtime, where Fourth Circuit holds that pleading standard for overtime claim requires enough detail to support reasonable inference that employee worked more than 40 hours in a given week, technicians alleged that employer's piece-rate system inadequately compensated technicians for significant amounts of work, and such allegations were supported by estimations of hours worked, breakdown of which hours employer determined "compensable" or "noncompensable," and average weekly pay.

Appeals from the United States District Court for the District of Maryland, at Baltimore. (1:14-cv-02355-JFM; 1:14-cv-03261-JFM). J. Frederick Motz, Senior District Judge.

REVERSED AND REMANDED.

ARGUED: Larkin E. Walsh, STUEVE SIEGEL HANSON LLP, Kansas City, Missouri, for Appellants.

Colin David Dougherty, FOX ROTHSCHILD LLP, Blue Bell, Pennsylvania, for Appellees.

ON BRIEF: George A. Hanson, Kansas City, Missouri, Ryan D. O'Dell, STUEVE SIEGEL HANSON LLP, San Diego, California, for Appellants.

Nicholas T. Solosky, FOX ROTHSCHILD LLP, Washington, D.C., for Appellees.

Before WYNN, FLOYD, and HARRIS, Circuit Judges. Judge Wynn wrote the opinion, in which Judge Floyd and Judge Harris joined.

WYNN

WYNN, Circuit Judge:

The Fair Labor Standards Act ("FLSA"), **29 U.S.C. §§ 201** *et seq.*, requires covered employers to pay their employees both a minimum wage and overtime pay, **id.§§ 206** , **207** In these consolidated cases, two groups of satellite television technicians ("Plaintiffs") allege that DIRECTV and DirectSat (collectively, "Defendants"), through a web of agreements with various affiliated and unaffiliated service providers, jointly employed Plaintiffs,1 and therefore are jointly and severally liable for any violations of the FLSA's substantive provisions. *See* **29 C.F.R. § 791.2(a)** .

The district court dismissed Plaintiffs' action on the pleadings, holding that Plaintiffs failed to adequately allege that DIRECTV and DirectSat jointly employed Plaintiffs. In so doing, the district court relied on out-of-circuit authority that we have since rejected as unduly restrictive in light of the broad reach of the FLSA. Analyzing Plaintiffs' allegations under the legal standard adopted by this Circuit and construing those allegations liberally, as we must when ruling on a motion to dismiss, *Wright v. North Carolina*, **787 F.3d 256** , **263** (4th Cir. 2015), we conclude that Plaintiffs' factual allegations state a claim under the FLSA. Accordingly, we reverse.

I.

A.

Plaintiffs appeal from an order granting Defendants' motion to dismiss under **Federal Rule of Civil Procedure 12(b)(6)** Accordingly, we recount the facts as alleged by Plaintiffs, accepting them as true and drawing all reasonable inferences in Plaintiffs' favor. *See E.I. du Pont de Nemours & Co. v. Kolon Indus. Inc.*, **637 F.3d 435** ,**440** (4th Cir. 2011).

As the nation's largest satellite television provider, DIRECTV engages thousands of technicians to install and repair satellite systems for customers throughout the country. In addition to employing some technicians directly, DIRECTV controls and manages many technicians through the DIRECTV "Provider Network." J.A. 93. According to the Amended Consolidated Complaint ("Complaint"), this network **[*2]** is organized as a pyramid, with DIRECTV contracting with certain intermediary entities known as "Home Service Providers" and "Secondary Service Providers." J.A. 93-94. These intermediary entities generally contract with "a patchwork of largely captive entities"—referred to in the Complaint as "subcontractors"—which in turn contract directly with individual technicians throughout the country. J.A. 94.

Following DIRECTV's acquisition of numerous Home and Secondary Service Providers, Defendant DirectSat was one of three "independent" Home Service Providers remaining in the DIRECTV Provider

Network at the time this action was initiated.[2] In this capacity, DirectSat served as a middle-manager between DIRECTV and individual technicians who contracted directly with DIRECTV, as well as between DIRECTV and various subcontractors that hired individual technicians. Specifically, DirectSat, like the other Home and Secondary Service Providers, implemented and enforced DIRECTV's hiring criteria for technicians, relayed scheduling decisions from DIRECTV to technicians using DIRECTV's centralized work-assignment system, and otherwise supervised technicians under its purview. DirectSat also maintained a "contractor file" for each of its technicians, which Plaintiffs describe as "analogous to a personnel file" and which were "regulated and audited by DIRECTV." J.A. 94-95. And, in accordance with its agreement with DIRECTV, DirectSat required technicians to obtain DIRECTV equipment and attend DIRECTV-mandated trainings at DirectSat facilities.

Each Plaintiff alleges that, between 2007 and 2014, he worked as a technician for DIRECTV, an intermediary provider, a subcontractor, or some combination of those entities. Plaintiffs Lewis and Wood allege that they were employed by DirectSat, while the five remaining Plaintiffs allege that they worked for other providers not named as defendants in this action. During their respective periods of employment, Plaintiffs were each generally classified by their employer or employers as an independent contractor.[3] In all instances, each Plaintiff's principal job duty was to install and repair DIRECTV equipment.

Regardless of the identity of Plaintiffs' nominal employers, DIRECTV primarily directed and controlled Plaintiffs' work. In particular, Plaintiffs allege that DIRECTV was the "primary, if not the only" client of each of the providers who served as Plaintiffs' direct employers and was the "source of substantially all of each [p]rovider's income." J.A. 93-94. At the same time, DIRECTV dictated nearly every aspect of Plaintiffs' work through its agreements with the various providers that directly employed technicians. Among other provisions, these agreements required that all technicians—and therefore Plaintiffs—pass pre-screening checks and background checks, review training materials published by DIRECTV, and become certified by the Satellite Broadcasting & Communications Association. The agreements likewise required technicians to purchase [*3] and wear DIRECTV shirts, carry DIRECTV identification cards, and display the DIRECTV logo on their vehicles. Those who did not satisfy DIRECTV's eligibility requirements could not carry out a technician's primary task: installing and repairing DIRECTV satellite equipment.

In addition to these eligibility requirements, DIRECTV, through its provider agreements, required technicians to receive their work assignments through a centralized system operated by DIRECTV. DIRECTV also mandated that technicians check in with DIRECTV before and after completing each assigned job, conduct installations and repairs strictly according to DIRECTV's standardized policies and

procedures, and interact with DIRECTV employees to activate satellite television service during each installation. The provider agreements also authorized DIRECTV employees to exercise quality control oversight over technicians, categorizing technicians' work as either compensable or noncompensable and imposing various compensation-related penalties for unsatisfactory service. Finally, the provider agreements allowed DIRECTV to effectively terminate technicians by ceasing to assign them work orders through the company's centralized work-assignment system.

B.

Claiming that they each regularly worked in excess of forty hours per week without receiving overtime pay while serving as DIRECTV technicians, Plaintiffs initiated this action in November 2013.[4] Specifically, Plaintiffs alleged that Defendants qualified as their joint employers during the relevant period, such that Defendants' failure to provide overtime pay for these additional hours violated the FLSA's overtime and minimum wage requirements. In addition to their claims under the FLSA, Plaintiffs allege that Defendants violated three Maryland wage and hour statutes: (1) the Maryland Wage and Hour Law, **Md. Code Ann., Lab. & Empl. §§ 3-401** *et seq.*; (2) the Maryland Wage Payment and Collection Law, **Md. Code Ann., Lab. & Empl. §§ 3-501** *et seq.*; and (3) the Maryland Workplace Fraud Act, **Md. Code Ann., Lab. & Empl. §§ 3-901** *et seq.*

Defendants each moved to dismiss Plaintiffs' Complaint pursuant to **Federal Rule of Civil Procedure 12(b)(6)**. On June 30, 2015, the district court granted Defendants' motions and dismissed Plaintiffs' claims in their entirety. *See Hall v. DIRECTV*, Nos. JFM-14-2355, JFM-14-3261, [**2015 BL 210679**], 2015 U.S. Dist. LEXIS 86892 , [**2015 BL 210679**], 2015 WL 4064692 , at *1 (D. Md. June 30, 2015).

In so doing, the district court devised and applied a two-step inquiry to determine whether Plaintiffs alleged a plausible FLSA joint employment claim. The court reasoned that the "first question that must be resolved is whether an individual worker is 'an employee'" of each putative joint employer within the meaning of the statute. [**2015 BL 210679**], 2015 U.S. Dist. LEXIS 86892 , [**WL**] at *2. Only if Plaintiffs qualified as employees—and not independent contractors—could the court reach what it deemed the second step of the inquiry: "whether an entity other than the entity with which the individual [plaintiff] had a direct relationship is a 'joint employer' of [the plaintiff]." ***Id***.

The district court looked to *Schultz v. Capital International Securities Inc.*, **466 F.3d 298** (4th Cir. 2006), **[*4]** to determine whether a worker qualifies as an "employee" within the meaning of the FLSA. *Hall*, [**2015 BL 210679**], 2015 U.S. Dist. LEXIS 86892 , [**2015 BL 210679**], 2015 WL 4064692 ,

at *2. *Schultz*, relying on *United States v. Silk*, 331 U.S. 704 , 67 S. Ct. 1463 , 91 L. Ed. 1757 , 1947-2 C.B. 167 (1947), applied six factors to determine whether a worker falls within the definition of an "employee" under the FLSA and, thus, benefits from the statute's protections. *Schultz*, 466 F.3d at 304-05 These factors include: "(1) the degree of control that the putative employer has over the manner in which the work is performed; (2) the worker's opportunities for profit or loss dependent on his managerial skill; (3) the worker's investment in equipment or material, or his employment of other workers; (4) the degree of skill required for the work; (5) the permanence of the working relationship; and (6) the degree to which the services rendered are an integral part of the putative employer's business." ***Id.*** (citing authorities).

Apparently assuming that Plaintiffs were not purely independent contractors outside of the FLSA's scope, the district court went on to consider whether DIRECTV was Plaintiffs' "joint employer" for purposes of the FLSA. *Hall*, [2015 BL 210679], 2015 U.S. Dist. LEXIS 86892 , [2015 BL 210679], 2015 WL 4064692 , at *2. In doing so, the district court employed a four-factor test originally set forth by the Ninth Circuit in *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465 , 1470 (9th Cir. 1983). *See Hall*, [2015 BL 210679], 2015 U.S. Dist. LEXIS 86892 , [2015 BL 210679], 2015 WL 4064692 , at *2; *see also Roman v. Gaupos III, Inc.*, 970 F. Supp. 2d 407 , 413 (D. Md. 2013). Under this test, the district court considered whether DIRECTV: (1) had the power to hire and fire the employee; (2) supervised and controlled employee work schedules or conditions of employment; (3) determined the rate and method of payment; and (4) maintained employment records. *Hall*, [2015 BL 210679], 2015 U.S. Dist. LEXIS 86892 , [2015 BL 210679], 2015 WL 4064692 , at *2.

Courts applying the *Bonnette* test, including the *Bonnette* Court itself, have emphasized that no single factor is dispositive in determining whether a particular entity qualifies as a joint employer. *Bonnette*, 704 F.2d at 1470 ; *see also Skrzecz v. Gibson Island Corp.*, No. CIV.A. RDB-13-1796, [2014 BL 194270], 2014 U.S. Dist. LEXIS 95047 , [2014 BL 194270], 2014 WL 3400614 , at *7 (D. Md. July 11, 2014). Nonetheless, while acknowledging that Plaintiffs "alleged facts sufficient to show that DIRECTV at least indirectly supervised [Plaintiffs'] work and directly controlled their schedules," the district court dismissed this arrangement as "not surprising" in light of DIRECTV's interest in maintaining its goodwill with consumers. *Hall*, [2015 BL 210679], 2015 U.S. Dist. LEXIS 86892 , [2015 BL 210679], 2015 WL 4064692 , at *2. Instead, the district court observed that the "ultimate test of employment is the hiring and firing of employees and the setting of their compensation amounts." ***Id.*** Reasoning that Plaintiffs failed to allege that DIRECTV directly hired or fired technicians working for its providers or otherwise controlled those technicians' compensation, the district court concluded that the Complaint did not allege facts sufficient to establish that DIRECTV jointly employed Plaintiffs. ***Id.***

Seeking to bolster this conclusion, the district court identified as relevant other considerations untethered to both the standard articulated in *Bonnette* and the similar standard applied by the district court itself. Specifically, the court posited that "if the entities that were part of the [DIRECTV] Provider System were undercapitalized and merely charades created [*5] by DIRECTV that followed every suggestion and payment decision made by DIRECTV, that would show, *perhaps* conclusively, DIRECTV's joint employer status." ***Id.*** (emphasis added). However, because "nothing implie[d] that the companies in the DIRECTV Provider Network were undercapitalized or slavishly followed every suggestion made by DIRECTV in regard to the status and method of payment of the technicians with whom they had a relationship[,]" the district court concluded that Plaintiffs failed to state a claim. ***Id.*** Instead, the district court found that Plaintiffs' allegations "show[ed] only that DIRECTV adopted a reasonable business model that allowed for the decentralization of decision-making authority regarding the employment of technicians who install its equipment." ***Id.*** According to the district court, such a "reasonable business model" did not support a finding of joint employment for purposes of the FLSA. ***Id.***

Having found that Plaintiffs failed to state an actionable FLSA claim against DIRECTV, the district court summarily concluded that Plaintiffs' claims under the Maryland wage and hour statutes also failed. [**2015 BL 210679**], 2015 U.S. Dist. LEXIS 86892 , **[WL]** at *3. Specifically, the district court observed that the definitions of "employer" embraced by the Maryland wage and hour statutes were either coextensive with or narrower than that set forth under the FLSA. ***Id*** . As such, just as DIRECTV did not qualify as Plaintiffs' joint employer under the FLSA, the district court reasoned that the company could not be held liable as a joint employer in connection with Plaintiffs' state law claims. ***Id*** . This timely appeal followed.

II.

We review *de novo* the district court's dismissal of a complaint under **Federal Rule of Civil Procedure 12(b)(6)** . *E.I. du Pont de Nemours*, **637 F.3d at 440** . **Federal Rule of Civil Procedure 8(a)(2)** requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." **Fed. R. Civ. P. 8(a)(2)** When ruling on a motion to dismiss, courts must accept as true all of the factual allegations contained in the complaint and draw all reasonable inferences in favor of the plaintiff. *E.I. du Pont de Nemours*, **637 F.3d at 440** ; *see also Anderson v. Found. for Advancement, Educ. & Emp't of Am. Indians*, **155 F.3d 500** , **505** (4th Cir. 1998) (explaining that federal "pleading standards require the complaint be read liberally in favor of the plaintiff").

To survive a motion to dismiss, Plaintiffs' factual allegations, taken as true, must "state a claim to relief that is plausible on its face." *Robertson v. Sea Pines Real Estate Co.*, **679 F.3d 278** , **288** (4th Cir. 2012)

(quoting *Ashcroft v. Iqbal*, 556 U.S. 662 , 678 , 129 S. Ct. 1937 , 173 L. Ed. 2d 868 (2009)). The plausibility standard is not a probability requirement, but "asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*,556 U.S. at 678 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 , 556 , 127 S. Ct. 1955 , 167 L. Ed. 2d 929(2007)). Although it is true that "the complaint must contain sufficient facts to state a claim that is plausible on its face, it nevertheless need only give the defendant fair notice of what the claim is and the grounds on which it rests." *Wright*, 787 F.3d at 263 (internal quotation marks and citations omitted). Thus, we have emphasized that "a complaint is to be construed liberally so as to do substantial justice." *Id* .

Under this standard, we reverse the district court's dismissal [*6] of Plaintiffs' claims for two reasons. First, the district court applied an improper legal test for determining whether entities constitute joint employers for purposes of the FLSA. Second, the district court misapplied the plausibility standard set forth in *Twombly* and *Iqbal* by subjecting Plaintiffs to evidentiary burdens inapplicable at the pleading stage and by failing to credit key factual allegations regarding Defendants' control and oversight of Plaintiffs' work as DIRECTV technicians. As explained below, when considered under the appropriate joint employment test and the proper standard for Rule 12(b)(6) motions, Plaintiffs' factual allegations plausibly demonstrate that DIRECTV and DirectSat jointly employed Plaintiffs during the relevant period.

III.

The Department of Labor regulation implementing the FLSA distinguishes "separate and distinct employment" from "joint employment." 29 C.F.R. § 791.2(a) "Separate employment" exists when "all the relevant facts establish that two or more employers are acting entirely independently of each other and are completely disassociated with respect to the" individual's employment. *Id* . By contrast, "joint employment" exists when "employment by one employer is not completely disassociated from employment by the other employer(s)." *Id* .When two or more entities are found to jointly employ a particular worker, "all of the employee's work for all of the joint employers during the workweek is considered as *one employment* for purposes of the [FLSA]." *Id* .(emphasis added). Thus, for example, all hours worked by the employee on behalf of each joint employer are counted together to determine whether the employee is entitled to overtime pay under the FLSA. *Id* .

Notwithstanding the regulation's seemingly straightforward language, courts have long struggled to articulate a coherent test for distinguishing separate employment from joint employment. As we have explained, much of this confusion stems from the Ninth Circuit's decision in *Bonnette v. California*

Health and Welfare Agency, **704 F.2d 1465** (9th Cir. 1983). *Salinas v. Commercial Interiors, Inc.*, No. 15-1915, *2017 U.S. App. LEXIS 1321* , *16 (argued Oct. 27, 2016). *Bonnette* drew on common-law agency principles, as well as the test used to address the distinct question of whether a particular worker is an employee or independent contractor, to adopt a multifactor test purporting to differentiate separate employment from joint employment by focusing on a putative joint employer's right to control an FLSA plaintiff's work. **704 F.2d at 1470** . The court identified four nonexclusive factors to guide this inquiry: "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." *Id.*

Following *Bonnette*, a number of courts, including district courts within this Circuit, have applied this four-factor test to determine whether two or more entities constitute joint employers under the FLSA. *Salinas*, No. 15-1915,*2017 U.S. App. LEXIS 1321* , *17 (**[*7]** collecting cases). At the same time, however, several circuits (including the Ninth Circuit, itself) have liberalized the *Bonnette* test to reflect Congress's original intent for the FLSA to extend protections beyond common-law employment relationships. *2017 U.S. App. LEXIS 1321* , at *19-20. As a result, at the time the district court considered Defendants' motions to dismiss in this case, courts in various jurisdictions within this Circuit and throughout the country applied numerous, distinct, multifactor joint employment tests. *Id.*

Perhaps reflecting this uncertain state of the law, the district court's review of Plaintiffs' joint employment allegations in this case is somewhat disjointed. As discussed above, *supra* Part I.B., the district court began its analysis by proposing an analytical framework under which it would first decide whether Plaintiffs fell within the FLSA's definition of "employee." *Hall*, [**2015 BL 210679**], 2015 U.S. Dist. LEXIS 86892 , [**2015 BL 210679**], 2015 WL 4064692 , at *2. Apparently assuming, without analysis, that Plaintiffs were employees within the FLSA's scope, the court went on to consider whether Defendants qualified as Plaintiffs' joint employers under the statute. ***Id*** . Applying the four-factor *Bonnette* test, the district court concluded that Plaintiffs failed to plausibly allege that Defendants were their joint employers during the relevant period. ***Id*** .

The district court's analysis of Plaintiffs' joint employment claims suffers from two basic flaws. First, the district court errantly concluded that a worker must be an employee—as opposed to an independent contractor—as to *each* putative joint employer when considered separately for the entities to constitute joint employers under the FLSA. As a result of this misinterpretation, the district court incorrectly treated a worker's status as an employee or independent contractor as to each putative joint employer as a threshold inquiry to be decided prior to determining whether the two entities are completely disassociated.

Second, the district court improperly relied on *Bonnette* to determine whether Defendants jointly employed Plaintiffs, leading the court to ignore important, relevant aspects of Plaintiffs' employment arrangement during their respective tenures as DIRECTV technicians.[6] We discuss each of these errors in turn.

A.

[1] First, the district court's treatment of whether Plaintiffs were employees—as opposed to independent contractors—of DIRECTV and DirectSat as a threshold question inverted the two-step inquiry we have adopted in FLSA joint employment cases.

We addressed the proper order of analysis in FLSA joint employment actions in *Schultz*. There, we established a two-step framework for determining whether a defendant may be held liable for an alleged FLSA violation under a joint employment theory. **466 F.3d at 305-09** Under this framework, we first must determine whether the defendant and one or more additional entities shared, agreed to allocate responsibility for, or otherwise codetermined the key terms and conditions of the plaintiff's work. ***Id*** .; *Salinas*, No. 15-1915, *2017 U.S. App. LEXIS 1321* at *30-31. The second step **[*8]** of the analysis—which asks whether a worker was an employee or independent contractor for purposes of the FLSA—depends in large part upon the answer to the first step. Namely, if we determine that the defendant and another entity codetermined the key terms and conditions of the worker's employment, then we must consider whether the two entities' *combined* influence over the terms and conditions of the worker's employment render the worker an employee as opposed to an independent contractor. By contrast, if the two entities are disassociated with regard to the key terms and conditions of the worker's employment, we must consider whether the worker is an employee or independent contractor with regard to *each*putative employer separately.

In adopting this framework, we explained that the joint employment doctrine is premised on the theory that, when two or more entities jointly employ a worker, the worker's entire "employment arrangement must be viewed as 'one employment' for purposes of determining whether the [worker was an] employee[] or independent contractor[] under the FLSA." *Schultz*, **466 F.3d at 307** (quoting **29 C.F.R. § 791.2(a)**). In other words, if a worker performs work for two or more entities that are "not completely disassociated" with respect to that worker's employment, **29 C.F.R. § 791.2(a)** , courts must aggregate the levers of influence over the key terms and conditions of the worker's employment exercised by *all* of the entities when determining whether the worker is an "employee" within the meaning of the FLSA. Accordingly, the district court in this case erred by considering whether Plaintiffs qualified as employees "without first

determining whether a joint employment relationship existed" between DIRECTV, DirectSat, and Plaintiffs' other putative joint employers.[7] *Schultz*, **466 F.3d at 309**.

Focusing first on the relationship between putative joint employers is essential to accomplishing the FLSA's "remedial and humanitarian" purpose. *Purdham v. Fairfax Cty. Sch. Bd.*, **637 F.3d 421**, **427** (4th Cir. 2011) (internal quotation marks omitted) (quoting *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, **321 U.S. 590**, **597**, **64 S. Ct. 698**, **88 L. Ed. 949** (1944)). Indeed, a worker who performs services for two or more entities that are "not completely disassociated" with respect to his work may not amount to an "employee" protected by the FLSA when his relationship to each entity is considered separately, but may come within the statutory definition of an "employee" when his relationships to all of the relevant entities are considered in the aggregate. By ignoring the relationships *between* and *among* these entities vis-à-vis the worker, the framework deployed by the district court erroneously failed to take account of a worker's *entire* employment when considering whether he or she is covered by the FLSA. This approach departs from the framework we set forth in *Schultz* and risks creating significant gaps in the broad, protective coverage Congress sought to ensure in adopting the FLSA.

Although our two-step test will, consistent with congressional intent, extend FLSA protection to individuals who are independent contractors when their work for each entity **[*9]** is considered separately but employees when their work is considered in the aggregate, it will not automatically render every independent contractor who performs services for two or more entities an "employee" within the FLSA's scope. Rather, under this two-step inquiry, individuals who bear true hallmarks of independent contractor status will remain outside of the FLSA's scope even if they perform work for two or more entities that are "not completely disassociated" with respect to those individuals' work. For instance, two businesses agreeing to share the services of a single handyman may not be "completely disassociated" when they arrange for the handyman to perform services on their premises at mutually acceptable times. But, if the handyman owns his own tools and provides his own materials, can choose to stop working for either or both businesses of his own accord, and is not an integral part of either business's principal purpose, he may nonetheless remain an independent contractor for purposes of the FLSA. Accordingly, the businesses, despite their incomplete disassociation, would have no obligations under the FLSA with respect to the handyman.[8]

Through properly segregating and organizing these two distinct questions, the analytical framework we embraced in *Schultz* "leads to a proper determination of whether, as a matter of economic reality, the [plaintiffs] were dependent on the joint employers or whether they were in business for themselves." **466 F.3d at 307**. By contrast, by inverting that framework, the district court in this case failed to consider

whether Defendants' shared influence over Plaintiffs' day-to-day work rendered Plaintiffs economically dependent on DIRECTV and DirectSat during their respective periods of employment, such that Plaintiffs constituted "employees" under the FLSA.

B.

1.

Although the district court's inversion of the two-step *Schultz* framework alone would warrant reversal, the district court compounded its error by relying on *Bonnette* to consider the sufficiency of Plaintiffs' joint employment allegations.

We recently joined many of our sister circuits in concluding that the *Bonnette* Court's reliance on common-law agency principles ignores Congress's intent to ensure that the FLSA protects workers whose employment arrangements do not conform to the bounds of common-law agency relationships. *Salinas*, No. 15-1915, *2017 U.S. App. LEXIS 1321* at *19. In instructing district courts not to follow *Bonnette*, we emphasized two additional concerns with existing joint employment tests. *Id.* Specifically, we explained that these tests: "(1) improperly focus on the relationship between the employee and putative joint employer, rather than on the relationship between the putative joint employers, and (2) incorrectly frame the joint employment inquiry as solely a question of an employee's 'economic dependence' on a putative joint employer." *Id.*

With this in mind, instead of adopting a previously existing test, we articulated a new standard that draws on the history and purpose of the FLSA, as well as **[*10]** the Department of Labor regulation that implements the statute and recognizes the existence of joint employment arrangements. *2017 U.S. App. LEXIS 1321* , at *31-32. Under our framework, the "fundamental question" guiding the joint employment analysis is "whether two or more persons or entities are 'not completely disassociated' with respect to a worker such that the persons or entities share, agree to allocate responsibility for, or otherwise codetermine—formally or informally, directly or indirectly—the essential terms and conditions of the worker's employment." *2017 U.S. App. LEXIS 1321* , at *30.

To assist lower courts in determining whether the relationship between two entities gives rise to joint employment, we identified the following six, nonexhaustive factors to consider:

(1) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the ability to direct, control, or supervise the worker, whether by direct or indirect means;

(2) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to—directly or indirectly—hire or fire the worker or modify the terms or conditions of the worker's employment;

(3) The degree of permanency and duration of the relationship between the putative joint employers;

(4) Whether through shared management or a direct or indirect ownership interest, one putative joint employer controls, is controlled by, or is under common control with the other putative joint employer;

(5) Whether the work is performed on a premises owned or controlled by one or more of the putative joint employers, independently or in connection with one another; and

(6) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate responsibility over functions ordinarily carried out by an employer, such as handling payroll; providing workers' compensation insurance; paying payroll taxes; or providing the facilities, equipment, tools, or materials necessary to complete the work.

2017 U.S. App. LEXIS 1321 , at *30-31. Further, because the status of a particular employment relationship is highly fact-dependent, we emphasized that the absence of a single factor—or even a majority of factors—is not determinative of whether joint employment does or does not exist. *2017 U.S. App. LEXIS 1321* , at *33.

Much like its misapplication of the two-step framework set forth in *Schultz*, the district court's reliance on the *Bonnette* factors in this case rendered the court's consideration of Plaintiffs' joint employment allegations fundamentally flawed and unduly restrictive.[2] In particular, the district court's control-based analysis omitted consideration of the relationship between the putative joint employers and thus ignored important elements of coordination between Defendants, as well as many of Defendants' shared levers of influence over Plaintiffs' work as DIRECTV technicians. Because the district court applied an improper test in determining whether Plaintiffs were "separate[ly]" or "joint[ly]" employed, the court erred in granting Defendants' **[*11]** motions to dismiss.

2.

Beyond this initial error, we also reject the district court's assertion that an FLSA defendant, like DIRECTV, that does not directly employ a plaintiff is subject to joint employment liability only if the plaintiff's direct employer "slavishly followed *every* suggestion made by [the defendant] in regard to the status and method of payment of the [plaintiff]." *Hall*, [**2015 BL 210679**], 2015 U.S. Dist. LEXIS 86892 , [**2015 BL 210679**], 2015 WL 4064692 , at *2 (emphasis added). As we explained previously, to

determine whether "separate" or "joint" employment exists, courts must focus on whether putative joint employers "*share, agree to allocate responsibility for*, or otherwise *codetermine*" the essential terms and conditions of a worker's employment. *Salinas*, No. 15-1915, *2017 U.S. App. LEXIS 1321* at *3 (emphasis added). Accordingly, the FLSA does not require that an entity have unchecked—or even primary—authority over all—or even most—aspects of a worker's employment for the entity to qualify as a joint employer. Rather, the entity must only play a role in establishing the key terms and conditions of the worker's employment.

For this reason, we further reject the district court's conclusion that for joint—as opposed to separate—employment to exist, a majority of factors must weigh in favor of joint employment. *Hall*, [**2015 BL 210679**], 2015 U.S. Dist. LEXIS 86892 , [**2015 BL 210679**], 2015 WL 4064692 , at *2 (finding no joint employment under the four-factor *Bonnette* test, notwithstanding that Plaintiffs "alleged facts sufficient to show that DIRECTV at least indirectly supervised their work and directly controlled their schedules," because the remaining three factors weighed in favor of separate employment). The Department of Labor's regulation implementing the joint employment doctrine requires that the "determination of whether the employment by the employers is to be considered joint employment or separate and distinct employment for purposes of the [FLSA] depends upon *all the facts in the particular case*." **29 C.F.R. § 791.2(a)** (emphasis added). To that end, the nonexclusive factors we have identified to guide the first step of the joint employment inquiry "offer[] a way to think about [whether entities are joint or separate employers,] not an algorithm." *Reyes v. Remington Hybrid Seed Co.*, **495 F.3d 403** ,**408** (7th Cir. 2007). Accordingly, "toting up a score is not enough." ***Id*** . Rather, "one factor alone"—such as DIRECTV's supervision and control of Plaintiffs' schedules—can give rise to a reasonable inference that plaintiffs will be able to develop evidence establishing "that two or more persons or entities are 'not completely disassociated' with respect to a worker's employment if the [allegations] supporting that factor demonstrate that the person or entity has a substantial role in determining the terms and conditions of a worker's employment." *Salinas*, No. 15-1915, *2017 U.S. App. LEXIS 1321* at *32-33.

This is particularly true at the pleading stage, when plaintiffs have had no "opportunity for discovery as to payroll and taxation documents, disciplinary records, internal corporate communications, or leadership and ownership structures." *Thompson v. Real Estate Mortg. Network*, **748 F.3d 142** , **145** (3d Cir. 2014); *see also Ash v. Anderson Merchandisers, LLC*, **799 F.3d 957** , **961** (8th Cir. 2015) (holding that, at the **[*12]** pleading stage, plaintiffs relying on a joint employer theory are "not required to determine conclusively which [defendant] was their employer or describe in detail the employer's corporate structure").

We likewise reject the district court's suggestion that an FLSA plaintiff may hold a defendant that does not directly employ the plaintiff liable as a joint employer only if the plaintiff alleges that his direct employer was "undercapitalized" and that the arrangement between the defendant and the direct employer was a "mere[] charade[]." *Hall*, [2015 BL 210679], 2015 U.S. Dist. LEXIS 86892 , [2015 BL 210679], 2015 WL 4064692 , at *2. To be sure, "facts demonstrating that two entities jointly engaged in a bad faith effort to evade compliance with the FLSA will provide strong evidence that the entities are 'not completely disassociated' with respect to that worker's employment." *Salinas*, No. 15-1915, *2017 U.S. App. LEXIS 1321* at *39. But bad faith is not a precondition to liability as a joint employer. *2017 U.S. App. LEXIS 1321* at *39-40.

Additionally, even if allegations of bad faith were required—which they are not—Plaintiffs explicitly allege that the DIRECTV Provider Network was "*purposefully designed* to exercise the right of control over DIRECTV's technician corps while avoiding the responsibility of complying with the requirements of the FLSA." J.A. 97 (emphasis added). Thus, the challenged employment scheme "ensure[s] [that] DIRECTV controls its technicians' work, while *deliberately disclaiming* their status as employees under state and federal employment laws." Id. at 101 (emphasis added). The district court improperly failed to credit these allegations of bad faith—despite the requirement that it do so in ruling on a motion to dismiss under **Rule 12(b)(6)** —in dismissing Plaintiffs' claim.

C.

The district court's errors notwithstanding, we may affirm the disposition of Defendants' motions to dismiss "on any grounds supported by the record, notwithstanding the reasoning of the district court." *Tankersley v. Almand*,**837 F.3d 390** , **395** (4th Cir. 2016) (internal quotation marks omitted). Accordingly, to determine whether reversal is warranted in this case, we must consider whether, applying the appropriate legal standards, Plaintiffs' allegations are sufficient to state a plausible FLSA joint employment claim against Defendants.

1.

As previously explained, to determine whether Plaintiffs have alleged a plausible FLSA joint employment claim, we must first consider whether—taking Plaintiffs' allegations, and all reasonable inferences therefrom, as true—Defendants were "entirely independent" with respect to Plaintiffs' work as DIRECTV technicians, **29 C.F.R. § 791.2(a)** , or, instead, codetermined the essential terms and conditions of that work, *Salinas*, No. 15-1915, *2017 U.S. App. LEXIS 1321* at *30. Analyzing this fundamental question

using the six factors set forth above to guide our inquiry, we conclude that Plaintiffs' factual allegations establish that DIRECTV, DirectSat, and other members of the DIRECTV Provider Network jointly determined the key terms and conditions of Plaintiffs' employment.

To begin with, Plaintiffs allege that DIRECTV, DirectSat, and the other Home and Secondary Service Providers[*13] instituted and operated a fissured employment scheme, governed by a web of provider agreements, that endured throughout Plaintiffs' periods of employment as DIRECTV technicians and was essential to the installation and repair of DIRECTV's own products. DIRECTV was the principal—and, in many cases, only—client of the lower-level subcontractors, and DIRECTV often infused capital into or formally "absorb[ed]" the subcontractors when necessary. J.A. 97.

Moreover, according to the Complaint, DIRECTV and DirectSat allocated, through provider agreements with one another and with subcontractors in the Provider Network, the authority to direct, control, and supervise nearly every aspect of Plaintiffs' day-to-day job duties. For example, through these contractual arrangements, DIRECTV compelled Plaintiffs to obtain their work schedules and job assignments through DIRECTV's centralized system and to follow "particularized methods and standards of installation to assure DIRECTV's equipment is installed according to the dictates of DIRECTV's policies and procedures." J.A. 96. And DIRECTV's provider agreements also allowed the company "to control nearly every facet of the technicians' work," including by requiring Plaintiffs to hold themselves out as representatives of the company, to wear DIRECTV uniforms, to carry DIRECTV identification cards, and to display the company's logo on their vehicles when performing work for the company. J.A. 96-97.

Contrary to the district court's assertion that Plaintiffs failed to allege "facts that would show that DIRECTV has the power to hire and fire technicians [or] determine their rate and method of payment," *Hall*, [2015 BL 210679], 2015 U.S. Dist. LEXIS 86892 , [2015 BL 210679], 2015 WL 4064692 , at *2, the Complaint is replete with allegations that DIRECTV, DirectSat, and other members of the Provider Network shared authority over hiring, firing, and compensation. Regarding hiring and firing, the Complaint alleges that "DIRECTV set forth the qualification 'hiring' criteria" for technicians, including Plaintiffs, while DirectSat and other Home and Secondary Service Providers "implemented and enforced those qualifications." J.A. 94. And although Plaintiffs' direct employers had formal firing authority, DIRECTV used its centralized work-assignment system to effectively terminate technicians by ceasing to assign them work.

DIRECTV and members of its Provider Network also shared authority over technicians' compensation. Whereas DirectSat or other subcontractors issued Plaintiffs' paychecks, DIRECTV played an integral role

in setting Plaintiffs' compensation. For instance, the Complaint alleges that DIRECTV retained authority in its provider agreements to determine whether work performed by DIRECTV technicians, including Plaintiffs, was "compensable" or "noncompensable." J.A. 100. Plaintiffs characterize this compensation scheme as a "piece-rate" system, through which Plaintiffs were paid a particular rate based on the specific tasks they performed. *Id.* A piece-rate system is permissible under the FLSA only where the parties agree that all **[*14]** of an employee's hours, including nonproductive hours, are compensated and included in the employee's total working time and where the employer continues to comply with the statute's overtime provisions. *See* **29 C.F.R. § 778.318**

In addition to compensable work, Plaintiffs also regularly performed additional tasks that, although essential to the installation and operation of DIRECTV products, went uncompensated by either DIRECTV or its providers. This work included "assembling satellite dishes, driving to and between job assignments, reviewing and receiving schedules, calling customers to confirm installations, obtaining required supplies, assisting other technicians with installations, performing required customer educations, contacting DIRECTV to report in or activate service, working on installations that were not completed, and perform[ing] additional work on installations previously completed." J.A. 103. DIRECTV also retained authority over compensation by imposing "chargebacks and/or rollbacks" on a technician's pay when DIRECTV determined, in its sole authority, that the technician provided unsatisfactory service. Id. at 101. By maintaining authority to determine what work would be deemed compensable and to impose chargebacks, DIRECTV retained significant authority over the manner and method by which Plaintiffs and other technicians were paid for their work.

Regarding DirectSat, Plaintiffs Lewis and Wood assert that the company—in its role as a middle-manager in the DIRECTV Provider Network—implemented DIRECTV's hiring and training criteria, relayed scheduling decisions to DIRECTV technicians, and required technicians to obtain DIRECTV equipment and attend DIRECTV-mandated trainings at its facilities. Moreover, Lewis and Wood allege that DirectSat maintained employment records for all technicians who performed work for the company, which records DIRECTV reviewed and audited.

Of course, later discovery may demonstrate that DIRECTV and DirectSat did not "share, agree to allocate responsibility for, or otherwise codetermine the essential terms and conditions of" Plaintiffs' employment, *Salinas*, No. 15-1915, *2017 U.S. App. LEXIS 1321* at *29-30, or that neither Lewis nor Wood was employed, either directly or indirectly, by DirectSat. At this stage of the litigation, however, Plaintiffs' allegations are sufficient to make out a plausible claim that DirectSat was "not completely

disassociated" from DIRECTV and other service providers with regard to setting the essential conditions under which Plaintiffs Lewis and Wood worked in their capacities as DIRECTV technicians.

2.

[2] Having established that Plaintiffs' allegations sufficiently demonstrate that DIRECTV and DirectSat were not completely disassociated with respect to Plaintiffs' work as DIRECTV technicians, we now turn to the second step of the joint employment inquiry. In particular, we must consider whether, from the perspective of Plaintiffs' "one employment" with DIRECTV and DirectSat (or other applicable entities within DIRECTV' **[*15]** s tiered structure), Plaintiffs have sufficiently alleged that they were employees, as opposed to independent contractors, for purposes of the FLSA. *Schultz*, **466 F.3d at 307** . Under the one-employment theory described above, we consider the entire context of Plaintiffs' work on behalf of DIRECTV and DirectSat and aggregate those aspects of that work that Defendants, either jointly or individually, influenced, controlled, or determined. ***Id*** .

To determine whether Plaintiffs are properly classified as employees or independent contractors under the FLSA, we focus on the "'economic realities' of the relationship" between the defendants and the plaintiffs. **Id. at 304**(quoting *Henderson v. Inter—Chem Coal Co.*, **41 F.3d 567** , **570** (10th Cir. 1994)). In particular, we consider whether, in performing their work as DIRECTV technicians, Plaintiffs were "economically dependent" on Defendants or, instead, were "in business for [themselves]." **Id. at 304** To make this determination, we look to the six factors identified by the Supreme Court in *United States v. Silk*, **331 U.S. 704** , **67 S. Ct. 1463** , **91 L. Ed. 1757** , 1947-2 C.B. 167 (1947). These factors include: "(1) the degree of control that the putative employer[s] ha[ve] over the manner in which the work is performed; (2) the worker's opportunities for profit or loss dependent on his managerial skill; (3) the worker's investment in equipment or material, or his employment of other workers; (4) the degree of skill required for the work; (5) the permanence of the working relationship; and (6) the degree to which the services rendered are an integral part of the putative employer[s'] business." **Id. at 304-05**

With these factors in mind, we conclude that Plaintiffs' allegations demonstrate that Plaintiffs were effectively economically dependent on Defendants while serving as DIRECTV technicians. As alleged by Plaintiffs, Defendants collectively influenced nearly every aspect of Plaintiffs' work as DIRECTV technicians. In particular, through its agreements with lower-level providers, DIRECTV largely determined who would be hired as a DIRECTV technician and exclusively determined the manner in which technicians would be compensated for their time. Although technicians, like Plaintiffs, largely supplied their own tools, DIRECTV provided the materials to be installed for DIRECTV customers and

determined whether Plaintiffs' pay for performing particular services would be deducted for any reason previously established by DIRECTV. Therefore, Plaintiffs could not increase their take-home pay through their own ingenuity or skill.

Through its required training materials and centralized work-assignment system, DIRECTV also dictated the manner in which technicians performed their work and controlled whether and when Plaintiffs could install and repair DIRECTV products. DIRECTV so extensively controlled Plaintiffs' day-to-day—indeed, hour-to-hour—work that the company not only required technicians to use equipment belonging to DIRECTV, but in fact expected technicians to hold themselves out as the company's representatives to customers by wearing DIRECTV uniforms and nametags and **[*16]** driving vehicles emblazoned with DIRECTV's logo. Finally, Plaintiffs' work was integral to DIRECTV's business—absent Plaintiffs' work installing and repairing DIRECTV satellite systems, DIRECTV would be unable to convey its product to consumers.

At the same time, although DirectSat apparently maintained relatively limited authority over the manner in which technicians working under its purview performed their work, Plaintiffs Lewis and Wood allege that the company was responsible for implementing and enforcing many of DIRECTV's mandates for its technicians. As noted, this arrangement endured throughout these Plaintiffs' respective periods of employment as technicians, during which time their installation and repair activities were essential to DIRECTV's provision of satellite television service to its customers. As such, and because we consider Plaintiffs' employment for DIRECTV and DirectSat in the aggregate, these allegations amply demonstrate that Plaintiffs, like other DIRECTV technicians, were economically dependent on DIRECTV and its affiliate providers in connection with their work on the company's behalf. Accordingly, Plaintiffs have stated a plausible claim that DIRECTV—and, as to Plaintiffs Wood and Lewis, DirectSat—was their joint employer under the FLSA and that Plaintiffs were "employees" within the meaning of the FLSA.

* * *

In sum, Plaintiffs adequately allege that DIRECTV, DirectSat, and subcontractors in the DIRECTV Provider Network shared responsibility for and codetermined the essential terms and conditions of Plaintiffs' employment as technicians. Plaintiffs' allegations further establish that—when viewed from the perspective of Plaintiffs' "one employment" with DIRECTV, DirectSat, and other subcontractors in the Provider Network—Plaintiffs were economically dependent on—and therefore jointly employed by—DIRECTV and DirectSat. Accordingly, the district court erred in dismissing Plaintiffs' FLSA claims on grounds that Plaintiffs failed to adequately establish joint employment.[10]

IV.

[3] Finally, Defendants ask, in the alternative, that we affirm the district court's dismissal of Plaintiffs' FLSA claims on the ground that Plaintiffs fail to articulate a sufficiently detailed accounting of the number of uncompensated hours they worked during their respective periods of employment to state a claim for unpaid overtime wages under the FLSA. Courts are divided as to the level of detail an FLSA overtime claimant must provide to overcome a Rule 12(b)(6) motion to dismiss. *See Butler v. DirectSat USA, LLC*, **800 F. Supp. 2d 662** ,667-68 (D. Md. 2011) (summarizing differing approaches). On one hand, a number of lower courts have adopted an approach under which plaintiffs are required to provide an approximation of the number of hours for which they were inadequately compensated to state a plausible overtime claim. *See, e.g., Jones v. Casey's Gen. Stores*, **538 F. Supp. 2d 1094** , **1102-03** (S.D. Iowa 2008). Although the precise degree of specificity required under this standard is less than clear, courts have expressed well-founded **[*17]** skepticism of such an unduly demanding pleading standard in overtime cases. *See Butler*, **800 F. Supp. 2d at 668** (noting that, "[w]hile [the d]efendants might appreciate having [the p]laintiffs' estimate of the overtime hours worked , it would be subject to change during discovery and if/when the size of the collective action grows and thus of limited value" at the pleading stage); *see also Landers v. Quality Commc'ns, Inc.*, **771 F.3d 638** , **645** (9th Cir. 2014), *cert. denied*, **135 S. Ct. 1845** , **191 L. Ed. 2d 754** (2015) (observing that "most (if not all) of the detailed information concerning a plaintiff-employee's compensation and schedule is in the control of the defendants" (citing *Pruell v. Caritas Christi*, **678 F.3d 10** , **15** (1st Cir. 2012))).

On the other hand, at least three other circuits have adopted a more lenient approach, requiring plaintiffs only to "sufficiently allege 40 hours of work in a given workweek as well as some uncompensated time in excess of the 40 hours." *Lundy v. Catholic Health Sys. of Long Island Inc.*, **711 F.3d 106** , **114** (2d Cir. 2013); *Davis v. Abington Mem. Hosp.*, **765 F.3d 236** , **241-43** (3d Cir. 2014) (adopting *Lundy* standard); *Landers*, **771 F.3d at 644-45** (same); *see also Manning v. Bos. Med. Ctr. Corp.*, **725 F.3d 34** , **46-47** (1st Cir. 2013) (applying the *Lundy* standard to conclude that plaintiffs alleged sufficient facts to survive dismissal); *cf. Sec'y of Labor v. Labbe*, **319 F. App'x 761**, **763** (11th Cir. 2008) (per curiam) (unpublished) (reasoning that, given the relative simplicity of FLSA overtime claims, extensive pleading is generally unnecessary and allowing claims to proceed based on allegations that defendant "repeatedly violated stated provisions of the FLSA by failing to pay covered employees minimum hourly wages and to compensate employees who worked in excess of forty hours a week at the appropriate rates").

Reviewing these decisions, we are persuaded to adopt the latter approach. Thus, to make out a plausible overtime claim, a plaintiff must provide sufficient factual allegations to support a reasonable inference that he or she worked more than forty hours in at least one workweek and that his or her employer failed to pay the requisite overtime premium for those overtime hours. Under this standard, plaintiffs seeking to overcome a motion to dismiss must do more than merely allege that they regularly worked in excess of forty hours per week without receiving overtime pay. *See Pruell*, **678 F.3d at 13** ; *Dejesus v. HF Mgmt. Servs., LLC*, **726 F.3d 85** , **90** (2d Cir. 2013) (explaining that the "requirement that plaintiffs must allege overtime without compensation in a 'given' workweek [is] not an invitation to provide an all-purpose pleading template alleging overtime in 'some or all workweeks'").

At the same time, however, we emphasize that the standard we today adopt does not require plaintiffs to identify a *particular* week in which they worked uncompensated overtime hours. Rather, this standard is intended "to require plaintiffs to provide some factual context that will 'nudge' their claim 'from conceivable to plausible.'" *Dejesus*, **726 F.3d at 90** (quoting *Twombly*, **550 U.S. at 570**). Thus, to state a plausible FLSA overtime claim, plaintiffs "must provide sufficient detail about the length and frequency of their unpaid work to support a reasonable inference that they worked more than forty hours in a given week." *Nakahata [*18] v. N.Y.-Presbyterian Healthcare Sys.*, **723 F.3d 192** , **201** (2d Cir. 2013). A plaintiff may meet this initial standard "by estimating the length of her average workweek during the applicable period and the average rate at which she was paid, the amount of overtime wages she believes she is owed, *or any other facts* that will permit the court to find plausibility." *Landers*, **771 F.3d at 645** (emphasis added) (citing *Pruell*, **678 F.3d at 14**); *see also Davis*, **765 F.3d at 243** (explaining that "a plaintiff's claim that she 'typically' worked forty hours per week, worked extra hours during such a forty-hour week, and was not compensated for extra hours beyond forty hours he or she worked during one or more of *those* forty-hour weeks, would suffice" (emphasis in original)).

Applying this standard here, we conclude that Plaintiffs' allegations provide a sufficient basis to support a reasonable inference that Plaintiffs worked uncompensated overtime hours while serving as DIRECTV technicians. The gravamen of Plaintiffs' Complaint is that, under DIRECTV's piece-rate compensation system (the terms of which Plaintiffs allege were not properly memorialized, as required by the FLSA), Plaintiffs consistently performed significant work for which they received inadequate compensation. As a result, Plaintiffs assert that, taking into account their total compensation and the number of hours they worked on behalf of Defendants, their final pay "did not reflect compensation for all hours worked and they were not properly compensated for overtime hours." J.A. 104.

As compared to a more traditional overtime claim based on an employee's standard hourly wage, Defendants' alleged piece-rate compensation system presents certain additional complexity under the FLSA. *See* **29 U.S.C. § 207(g)** (setting out various methods by which an employer may comply with the statute's overtime provisions under a piece-rate compensation scheme). At this stage of the litigation, however, we need not wade into these murky waters. Instead, our consideration of the sufficiency of Plaintiffs' claims must again focus on the degree to which Plaintiffs have alleged that they worked more than forty hours in a workweek and were not properly compensated for those additional hours. *Landers*, **771 F.3d at 645** (applying the *Lundy* standard to consider overtime allegations arising out of an employer's piece-rate compensation system).

In this case, in addition to their common allegations regarding the nature and structure of the DIRECTV Provider Network, Plaintiffs each describe in some detail their regular work schedules, rates of pay, and uncompensated work time. Specifically, each Plaintiff provides an approximation of his general workweek, with each Plaintiff alleging that he typically worked in excess (and, in some cases, well in excess) of forty hours per week. Supplementing these initial allegations, each Plaintiff further estimates the number of hours he worked in any given week, including a breakdown of the number of compensable and noncompensable hours he typically worked, as well as his average weekly pay and the amount by which this weekly compensation was typically**[*19]** reduced through DIRECTV-imposed penalties and unreimbursed business expenses.

This final level of granularity, coupled with Plaintiffs' common allegations regarding the types of work DIRECTV designated as compensable and noncompensable, ultimately nudges Plaintiffs' claims against Defendants from the merely conceivable to the plausible. At this initial stage, that is all that is required to overcome Defendants' motion to dismiss. *Cf. Landers* **771 F.3d at 646** (dismissing FLSA claims where the complaint lacked "any detail regarding a given workweek when [the plaintiff] worked in excess of forty hours and was not paid overtime for that given workweek and/or was not paid minimum wages"). Although Plaintiffs may ultimately be unable to substantiate their allegations through discovery, they have sufficiently alleged a plausible claim to unpaid overtime for their work on behalf of Defendants.

The district court's summary dismissal of Plaintiffs Wood and Lewis's claims against DirectSat suffers from a similar infirmity.[11] Contrary to the district court's submission that these Plaintiffs' allegations suggest that they were "paid an amount greater than that required by the FLSA," *Hall*, **[2015 BL 210679]**, 2015 U.S. Dist. LEXIS 86892 , **[2015 BL 210679]**, 2015 WL 4064692 , at *3, both Lewis and Wood expressly allege that they regularly performed uncompensated overtime work for Defendants during the course of their employment as DIRECTV technicians.

Though again unsupported by any citation or other reasoning, the district court's suggestion that Plaintiffs Lewis and Wood fail to state a claim because their final pay was "greater than required under the FLSA" suggests a fundamental misapprehension of the statute's requirements. In addition to setting a federal minimum wage, the FLSA separately requires employers to pay their workers an overtime premium for hours worked in excess of forty per week. **29 U.S.C. § 207**. For this reason, even assuming Plaintiffs Lewis and Wood each received an effective hourly wage above the minimum rate established by the FLSA, their overtime claims against Defendants are sufficiently pleaded to survive the present motions to dismiss.

V.

Under the appropriate legal standards, Plaintiffs have alleged sufficient facts to make out a plausible claim that Defendants jointly employed them as DIRECTV technicians. As such, Defendants may be held jointly and severally liable in the event that Plaintiffs performed uncompensated overtime work for Defendants during Plaintiffs' respective periods of employment. Because Plaintiffs have sufficiently pleaded (1) that DIRECTV—and, as to Plaintiffs Lewis and Wood, DirectSat—jointly employed them as satellite technicians and (2) that they are owed some amount of unpaid overtime compensation, we reverse the district court's dismissal of Plaintiffs' FLSA and Maryland state-law claims against Defendants and remand these consolidated cases for further proceedings consistent with this opinion.

REVERSED AND REMANDED

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fn 1

As explained in greater detail below, *infra* Part I.A., Plaintiffs each bring a claim under the FLSA against Defendant DIRECTV, with two Plaintiffs bringing a parallel claim against Defendant DirectSat. For purposes of clarity, the allegations set out in the Amended Consolidated Complaint are attributed to all Plaintiffs.

fn 2

Plaintiffs allege that DIRECTV "regularly infuses these [providers] with what it labels internally as 'extraordinary advance payments'" and frequently acquires providers when "litigation or other circumstances" present a potential business risk for DIRECTV. J.A. 97.

fn 3

Plaintiff Hall was initially classified as a direct employee of a provider in August 2009, but was reclassified as an independent contractor in November 2011.

fn 4

Plaintiffs pursued their overtime and minimum wage claims, either collectively or individually, in various federal jurisdictions before their claims were ultimately transferred to and consolidated in the United States District Court for the District of Maryland. *Hall v. DIRECTV*, Nos. JFM-14-2355, JFM-14-3261, [**2015 BL 210679**], 2015 U.S. Dist. LEXIS 86892 , [**2015 BL 210679**], 2015 WL 4064692 , at *1 n.2 (D. Md. June 30, 2015). In each instance in which they were previously considered, Plaintiffs' claims were dismissed without prejudice. ***Id.***

fn 5

Notably, in another FLSA action, the trial judge in this case applied a five-factor joint employment test that differed from the *Bonnette*-based test that he applied in this case, notwithstanding that the two cases were decided only a few months apart. *See Salinas*, No. 15-1915, *2017 U.S. App. LEXIS 1321* , at *8-9.

fn 6

As previously described, despite its recitation of the *Bonnette* factors, the district court's analysis turned largely on its misapprehension of Plaintiffs' allegations regarding the degree to which Defendants maintained the authority to hire and fire or otherwise set the rate of compensation for DIRECTV technicians like Plaintiffs. In this sense, even assuming that the *Bonnette*-like test applied by the district court was the appropriate joint employment test, the district court's dismissal of Plaintiffs' overtime claims was in error.

fn 7

Schultz acknowledged that in a small subset of cases this sequence of analyses may be unnecessary, **466 F.3d at 306** n.1, such as when the levers of influence over the essential terms and conditions of an individual's work exercised by putative joint employers would not give rise to an employer-employee relationship, regardless of whether the putative joint employers' levers of influence are considered in the aggregate.

fn 8

By the same token, a business that is deemed a joint employer under the FLSA as to *some* of its workers will not automatically be required to comply with the FLSA with respect to *all* of its workers. Some workers may be independent contractors ineligible for FLSA protection even though they perform services for the defendant and at least one other entity that is "not completely disassociated" with respect to the plaintiff's work.

fn 9

Given the confused state of FLSA joint employment case law—and that this Court had not yet identified factors for courts to consider in distinguishing separate employment from joint employment at the time the district court rendered its decision—this error is more than understandable.

fn 10

Defendants agree that Plaintiffs' claims under the Maryland Wage and Hour Law "stand or fall on the success" of their FLSA claims. Appellees' Br. at 37-38 (citing *Turner v. Human Genome Scis., Inc.*, **292 F. Supp. 2d 738** , **744** (D. Md. 2003)). Consequently, our resolution of the FLSA joint employment question also resolves Plaintiffs' claims under this parallel Maryland statute.

At the same time, however, Plaintiffs concede that the definitions of "employer" included in the Maryland Workplace Fraud Act and the Maryland Wage Payment and Collection Law are "technically narrower" than the definition embraced by the FLSA. Appellants' Br. at 16 (internal quotations omitted) (quoting *Skrzecz*, [**2014 BL 194270**], 2014 U.S. Dist. LEXIS 95047 , [**2014 BL 194270**], 2014 WL 3400614 , at *7 n.7). Because the district court errantly concluded that Plaintiffs failed to adequately allege joint employment for purposes of the FLSA, it did not address whether Defendants constitute "employers" for purposes of the Workplace Fraud Act and Wage Payment and Collection Law. *Hall*, [**2015 BL 210679**], 2015 U.S. Dist. LEXIS 86892 , [**2015 BL 210679**], 2015 WL 4064692 , at *3. We remand those claims to the district court to reconsider whether Plaintiffs have stated a claim under the relevant state-law tests and the proper standard for reviewing motions to dismiss under **Rule 12(b)(6)**

We further note that, in passing upon Plaintiffs' state law claims, the district court incorrectly suggested that the Maryland Wage and Hour Law and Workplace Fraud Act share a common definition of covered "employers," while the state's Wage Payment and Collection Law employs a narrower definition of that term. *See Hall*, [**2015 BL 210679**], 2015 U.S. Dist. LEXIS 86892 , [**2015 BL**

210679], 2015 WL 4064692 , at *3. In fact, it is the Workplace Fraud Act and Wage Payment and Collection Law that share a substantially similar definition, which diverges slightly from the definitions included in the FLSA and the analogous Wage and Hour Law. *Compare* **29 U.S.C.A. § 203(d)** (FLSA, defining "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee ") *and***Md. Code Ann., Lab. & Empl. § 3-401** (Wage and Hour Law, defining "employer" to include "a person who acts directly or indirectly in the interest of another employer with an employee"), *with***Md. Code Ann., Lab. & Empl. § 3-501(b)** (Wage Payment and Collection Law, defining "employer" to include "any person who employs an individual or a successor of the person") *and***Md. Code Ann., Lab. & Empl. § 3-901(c)** (Workplace Fraud Act, defining "employer" to mean "any person that employs an individual .").

fn 11

In disposing of these claims, which are pursued only by Plaintiffs Wood and Lewis, the district court first questioned the sufficiency of these Plaintiffs' allegations regarding when they were employed by DirectSat and suggested, without explanation or citation, that their claims against the company "may be time-barred." *Hall*, [**2015 BL 210679**], 2015 U.S. Dist. LEXIS 86892 , [**2015 BL 210679**], 2015 WL 4064692 , at *3. In fact, however, Wood and Lewis specifically allege that they worked as satellite technicians for DIRECTV, DirectSat, and other entities until 2011 and 2012, respectively.

In addition to DIRECTV and DirectSat, each of these Plaintiffs indicates that he worked as a DIRECTV satellite technician for at least one other entity during the relevant period, with Plaintiff Lewis indicating that he was involuntarily terminated by an entity called Commercial Wiring Incorporated in December 2012. Importantly, plaintiffs alleging joint employment under the FLSA need not "determine conclusively which [defendant] was their employer at the pleadings stage or describe in detail the employer's corporate structure." *Ash*, **799 F.3d at 961** . Rather, at this preliminary stage, it is enough that both Lewis and Wood allege that they worked as DIRECTV technicians for DirectSat during the relevant period to overcome Defendants' motions to dismiss.

STATE OF ILLINOIS)
) SS
COUNTY OF C O O K)

AFFIDAVIT OF SERVICE Br

SHARON A. FARMER, being first duly sworn upon oath, deposes and states that she served the foregoing **CHARGING PARTY'S BRIEF IN SUPPORT OF THE UNFAIR LABOR PRACTICE COMPLAINT** by mailing a true and accurate copy of same to the following, with proper postage prepaid, on the 25th day of May, 2017

Elizabeth S Cortez, Counsel
For the General Counsel
NLRB Region 13
Dirksen Federal Bldg
219 South Dearborn Street
Suite 808
Chicago, IL 60604

Eric P. Simon, Esq.
Douglas J Klein, Esq.
JACKSON LEWIS P.C.
666 Third Avenue
New York, NY 10017

Sharon A. Farmer
SHARON A. FARMER

Subscribed and sworn to before
me this 25th day of May, 2017

Notary Public

OFFICIAL SEAL
MARIANITA H TRAILER
NOTARY PUBLIC, STATE OF ILLINOIS
COOK COUNTY
MY COMMISSION EXPIRES 08/12/2020

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 13

DIRECTSAT USA, LLC.	:	
Respondent	:	
and	:	Case No. 13-CA-176621
IBEW, LOCAL 21	:	
Charging Party	:	

RESPONDENT'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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DirectSAT USA, LLC, ("DirectSat" or the "Respondent"), by its undersigned counsel, submits this brief in support of its position that the unfair labor practice charge in this case is without merit and should be dismissed in its entirety.

I. PRELIMINARY STATEMENT

DirectSat installs and services satellite television equipment for DirecTV pursuant to a Home Service Provider Agreement ("HSP Agreement") with DirecTV. During the course of extensive negotiations with IBEW, Local 21 (the "Union"), the Union requested a full copy of the HSP Agreement in connection with two discrete issues. The first on March 18, 2016 was in response to a proposal by DirectSat regarding the definition of unit work, which made a specific reference to services provided by DirectSat to DirecTV pursuant to the HSP Agreement. DirectSat provided that portion of the HSP Agreement which described the services covered by the HSP Agreement. The Union never asserted the response was inadequate or otherwise articulated why the response provided was insufficient. On May 19, 2016, the Union proffered a new rationale for its request for the full HSP Agreement. No longer asserting it needed the HSP Agreement in connection with any proposal advanced at the bargaining table, the Union now asserted it wanted to evaluate the extent of control of DirecTV on DirectSAT. This request, however, was not presumptively relevant to the terms and conditions of employment of unit employees, the Union never provided any objective reason showing it had a reasonable basis to believe DirecTV controlled terms and conditions of employment of DirectSat employees and the relevance of the information was not apparent to DirectSat under the circumstances. Accordingly, DirectSat was not obligated to provide the full HSP Agreement. Therefore, DirectSat complied in full with its legal obligations to provide information.

II. ISSUE PRESENTED

Whether the Respondent has violated Section 8(a)(5) of the Act by failing and

refusing to provide the Union with a full un-redacted copy of the HSP Agreement between DirecTV and DirectSat.

III. POSITIONS OF THE PARTIES

A. General Counsel's Position

The Complaint alleges in relevant part:

VI

(a) On or about March 18, 2016 and again on May 19, 2016, the Charging Party requested in writing that Respondent furnish the Charging Party with a full copy of the Home Service Provider Agreement between Respondent and DirecTV.

(b) The information requested by the Charging Party, as described above in VI(a), is necessary for, and relevant to, the Charging Party's performance of its duties as the exclusive collective-bargaining representative of the Unit.

(c) Since about March 18, 2016, Respondent, by an unnamed agent of Employer, has failed and refused to furnish the Charging Party with the information requested by it as described above in paragraph VI(a).

VII

(a) By the conduct described in paragraphs VI(a) through (c), Respondent has been failing and refusing to bargain collectively and in good faith the exclusive collective-bargaining representative of its employees in violation of Section 8(a)ca and (5) of the Act.

See JSF, Ex. 4.[1]

B. Respondent's Position

DirectSat complied in full with its legal obligations to provide information. The Union initially requested a full copy of the HSP Agreement to understand Respondent's New

[1] Citations to the Joint Stipulation of Facts are cited as (JSF ¶ __). Exhibits are cited as (JSF, Ex. __).

Product Lines proposal. Respondent provided the Union with all relevant information, including the applicable pages of the HSP Agreement. The Union never asserted the response was inadequate or otherwise suggested the portions of the HSP Agreement provided were insufficient. DirectSat thus complied with its obligations under Section 8(a)(5).

As to the Union's request for the full copy of the HSP Agreement to evaluate the degree of "control" by DirecTV over DirectSat, a full, un-redacted copy of the HSP Agreement is not relevant to the Union's performance of its duties as the exclusive bargaining representative of the bargaining unit. Where an information request does not involve the bargaining unit, there is no presumption of relevance, and the Union must establish the relevance and necessity of the information. The stipulated factual record in this case is devoid of any objective basis for the Union's purported belief that DirecTV exercised any "control" over terms and conditions of employment of unit employees. Accordingly, the General Counsel has not satisfied its burden of establishing the relevance and necessary of the full, un-redacted HSP Agreement or a violation of the Act.

IV. PROCEDURAL BACKGROUND

The Charge in this proceeding was filed by the Union on May 20, 2016, and a copy was served by regular mail on Respondent on May 20, 2016. (JSF, Ex. 1). The First Amended Charge in this proceeding was filed by the Union on June 13, 2016, and a copy was served by regular mail on Respondent on June 13, 2016. (JSF, Ex. 2). The Second Amended Charge in this proceeding was filed by the Union on September 14, 2016, and a copy was served by regular mail on Respondent on September 14, 2016. (JSF Ex. 3). Complaint and Notice of Hearing issued September 23, 2016 and was served by certified mail on Respondent on September 23, 2016. (JSF, Ex. 4). Respondent's Answer to the September 23, 2016 Complaint was received on October 5, 2016. (JSF, Ex. 5). An Order Postponing Hearing Indefinitely

issued on January 4, 2017. (JSF, Ex. 6).

V. FACTUAL BACKGROUND

Respondent services and installs satellite television equipment for DirecTV Inc. ("DirecTV"), a satellite television service provider. (JSF ¶ 7). On February 11, 2014, the Union was certified as the exclusive collective-bargaining representative of the following employees of Respondent ("Unit") for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time Installation/Service Technicians employed by the Employer at its facility located at 9951 W 190th St, Mokena, Illinois, 60448, but excluding all other employees, confidential employees, guards, and supervisors as defined in the Act.[2]

(JSF ¶¶ 12-13).

From September 4, 2014 through May 2016, the parties held approximately 24 bargaining sessions for a first contract and reached tentative agreements on many non-economic issues. (JSF ¶ 15). On November 12, 2014, Respondent presented its first "New Product Lines" proposal (Company Proposal No. 29) to the Union. The proposal addressed whether future products or services other than the installation and servicing of satellite television services would be deemed Unit work. (JSF ¶ 16; JSF Ex. 7). On December 10, 2014, the Union presented Respondent with a counterproposal to Company Proposal 29. (JSF ¶ 17; JSF Ex. 8). On September 15, 2015, Respondent presented the Union with its second New Product Lines proposal (Company Proposal No. 74). (JSF ¶ 18; JSF Ex. 9). On September 16, 2015, the Union presented Respondent with a counterproposal to Company Proposal No. 74. (JSF ¶ 19; JSF Ex. 10).

On November 4, 2015, Respondent presented the Union with Proposal No. 78,

[2] The Mokena facility relocated to South Holland, Illinois in or around May 2015.

replacing Company Proposal No. 74, which contained the following language:

> In the event the Employer is engaged with respect to product or services other than those pursuant to its Home Service Provider agreement with DirecTV ....

(JSF ¶ 20; JSF Ex. 11).

In response to Respondent's Proposal No. 78, on November 23, 2015, the Union, through Business Representative Dave Webster ("Webster"), via email, made an information request to Respondent's attorney, Eric P. Simon ("Simon")[3] which provided in part:

> ... one of the company proposals references the HSP agreement with DTV. We'd like a copy of the agreement referenced in the proposal.

(JSF ¶ 21; JSF Ex. 12). On December 4, 2015, Respondent, through its Human Resources Director, Lauren Dudley ("Dudley"), responded to the Union via email and provided the three pages of the HSP Agreement which identified the services provided by DirectSat to DirecTV pursuant to the HSP Agreement. (JSF ¶ 22; JSF Ex. 13).

On February 16, 2016, Webster, sent an email to Simon, which stated:

> I have heard that AT&T has extended the DirecTV contract with DirectSat for another 3 years. With AT&T & DirectSat both Installing [sic] the DirecTV Dish we need to understand the relationship between AT&T & DirectSat and the shared work. Please send a copy of the current agreement between DirectSat & AT&T/DTV for use in bargaining.

(JSF ¶ 23; JSF Ex. 14).[4]

On February 20, 2016, Simon responded to Webster's February 16th email stating:

> We have no idea what you have heard or whom you have heard it from, but your "information" is erroneous. DirectSat has entered into no new agreements with AT&T. In early 2015,

[3] At all material times, Simon held the position of Respondent's outside legal counsel and chief spokesperson in connection with collective bargaining negotiations between Respondent and the Union. (JSF ¶ 11).
[4] On or about July 24, 2015, DirectTV was acquired by AT&T. (JSF ¶ 23, n.3).

> DirecTV extended its contract with DirectSat through 2018, but there has been nothing further.
>
> As to the substance of your request, you seem to assert is relevant because you believe DirecTV (I assume you refer to AT&T because of the recent acquisition of DirecTV by AT&T) and DirectSat have "shared" work. Again, you are mistaken. There is no "shared" work. As far as DirectSat is concerned, all of the work is DirecTV's. DirecTV currently has, and always has had, the right to contract as much or as little or none of its satellite TV system installation and service work to DirectSat as it, in its sole discretion, may decide. DirectSat only performs the work that DirecTV authorizes it to perform. DirectSat has never had an exclusive right to install/service DirecTV systems. Just as DirecTV had the ability to decide to whom it would contract with or if it would contract out installation/service work at all prior to the AT&T-DirecTV merger, DirecTV (even as a subsidiary of AT&T) continues to determine what and how much work to contract out. This is not an issue DirectSat has any control over or ever had any control over, and as such is not a mandatory subject of bargaining. Bargaining unit work has been and will continue to be the installation and service of DirecTV systems to the extent and degree DirecTV authorizes DirectSat to perform such work. While Local 21 may have an issue with DirecTV's subcontracting of such work, it is not relevant to our negotiations.

(JSF ¶ 24; JSF Ex. 15).

Although Dudley had responded to the Union's request for information regarding the scope of services provided by DirectSat to DirecTV pursuant to the HSP Agreement, on March 18, 2016, Webster emailed Simon again requesting the HSP Agreement "particularly because of the reference [to the HSP Agreement] in the New Product Lines proposal." (JSF ¶ 25; JSF Ex. 16).

The Parties met for a bargaining session on March 22, 2016. (JSF ¶ 26). At the bargaining session Simon acknowledged the Union's March 18, 2016 request for a full copy of the HSP Agreement. Id. Simon stated that Respondent had already provided the Union with the

relevant portions of the HSP Agreement. Id. Later at the same bargaining session the Union presented its counterproposal to Company Proposal No. 78 (New Product Lines). (Id.; JSF Ex. 17).

On May 19, 2016, at 9:31 a.m.., Webster sent an email to Simon stating:

> Mr. Simon,
>
> In connection with DirectSat negotiations I renew my request for a FULL copy of the HSP agreement between DirectSat and DirecTV/AT&T in additional to all current agreements with sub contractors [sic], to evaluate the extent of control of DirectSat by DirecTV/AT&T.

(JSF ¶ 29; JSF Ex. 20). On May 19, 2016, at 10:28 a.m. Simon responded:

> Dear Mr. Webster: We have already provided you with all relevant information regarding this request. We see no reason to supplement our response.

(JSF ¶ 30; JSF Ex. 21). On May 23, 2016, Simon faxed a letter to Webster explaining why Respondent was declining to provide a complete copy of the HSP agreement. (JSF ¶ 31; JSF Ex. 22). Simon wrote:

> The request for the full copy of the HSP agreement to evaluate DirecTV's control over DirectSat is irrelevant to negotiations between DirectSat and Local 21 regarding terms and conditions of employment of DirectSat employees. The 'extent of control' of DirecTV over DirectSat has no bearing on negotiations over wages, hours, or other terms and conditions of employment which are exclusively controlled by DirectSat. As previously explained to you at the table. DirecTV does not, and has no control over the wages paid to DirectSat employees or the metrics used to evaluate the performance of unit employees. These decisions are vested exclusively in DirectSat. For the 2+ years since Local 21 was certified as the representative of employees of DirectSat's Chicago South (now South Holland location), DirectSat has bargaining in good faith over the wages, hours and other working conditions of employment of unit employees. DirecTV has no role in these negotiations. DirectSat has never asserted that it cannot agree to a proposal on any issue because DirecTV might disapprove. Nor is the ability of DirectSat to enter into

> a collective bargaining agreement with Local 21 subject to approval by DirecTV.
>
> DirectSat has provided Local 21 with those portions of the contract with DirecTV which may have some relevance to our negotiations – the scope of work covered by the HSP agreement and the metrics used by DirecTV to evaluate the performance of DirectSat under the HSP agreement. (DirectSat did not object to providing this information on the basis that while DirectSat has fully authority to set performance metrics for unit technicians, DirectSat has stated that the metrics established by DirecTV to evaluate DirectSat help inform DirectSat in establishing performance metrics for technicians.)

JSF, Ex. 22. On May 24, 2016, the Parties met for a collective bargaining session at which the New Product Lines proposal was discussed. (JSF ¶ 33).

VI. ARGUMENT

A. DirectSAT Appropriately Responded to All of the Union's Requests for Relevant Information and Documents.

There are two requests for information alleged in the Complaint, one on March 18, 2016 and another on May 19, 2016:

> **March 18, 2016:** The union requests a FULL copy of the HSP agreement between DrectSat and DirecTV particularly because of the reference n [sic] the New Product Lines proposal.
>
> **May 19, 2016:** In connection with DirectSat negotiations I renew my request for a FULL copy of the HSP agreement between DirectSat and DirecTV/AT&T . . . to evaluate the extent of control of DirectSat by DirecTV/AT&T.

JSF, Ex. 4. The General Counsel has not proven a violation with respect to either request.

The stipulated factual record is clear. Respondent provided thorough, substantive responses to all of the Union's relevant requests for information and documents related to the scope of services provided by DirectSat to DirecTV. The Union never informed Respondent that it believed the three pages of the HSP Agreement which described the services provided by DirectSat (and thus constituted unit work) were insufficient to evaluate DirectSat's New Product

Lines proposal. With respect to the Union's request for a "FULL" copy of the HSP Agreement to "evaluate the extent of control of DirectSat by DirecTV/AT&T," the request does not address terms and conditions of employment and is thus not presumptively relevant to bargaining. Moreover, there is nothing in the record establishing any objective basis for the Union's purported belief that there was any level of control exercised by DirecTV over DirectSat with respect to terms and conditions of employment of unit employees, and the relevance of the information certainly was not apparent to DirectSat under the circumstances. Accordingly, the General Counsel has not established a violation of the Act.

1. Respondent Already Had Provided the Relevant Portions of the HSP Agreement By the Time of the Union's March 18, 2016 Information Request

The stipulated factual record demonstrates that by the time Webster made the March 18, 2016 information request, Respondent already had provided the relevant portions of the HSP Agreement to the Union in December 2015 related to scope of services provided by DirectSat pursuant to the HSP Agreement and advised Webster in February 2016 that there was no "shared" work between DirectSat and DirecTV. There is nothing in the record establishing that Webster ever objected to DirectSat's responses or asserted they were incomplete or insufficient for any reason.

The Union's conduct at the bargaining table immediately after the March 18, 2016 information request also contradicts its claim it needed to see a full, un-redacted copy of the HSP Agreement to bargain. Indeed, the Parties met for a bargaining session on March 22, 2016, Simon stated that Respondent already provided the Union with the relevant portions of the HSP Agreement and the Union presented its New Product Lines counterproposal. Clearly the Union had the information it required to bargain.

2. The General Counsel Has Not Established a Violation of the Act Related to the Union's May 19, 2016 Information Request For Non-Unit Information.

The Complaint alleges that the HSP Agreement requested by the Union is "necessary for, and relevant to, the [Union's] performance of its duties as the exclusive-bargaining representative of the Unit." JSF, Ex. 4. However, the record does not set forth any evidence establishing a basis for the General Counsel's claim that the HSP Agreement was presumptively relevant to the terms and conditions of employment of Unit employees.[5]

The duty to bargain under the Act includes the duty to provide information that is necessary for the union to perform its functions as representative of the bargaining unit, and information pertaining to mandatory subjects of bargaining is presumptively relevant to the union's role. See, e.g., Southern California Gas Co., 344 NLRB 231 (2005). The Board has held that information requests that do not involve the bargaining unit are not presumptively relevant, and the requesting party has the burden of establishing that the information sought is relevant to a legitimate issue of bargaining. Disneyland Park, 350 NLRB 1256, 1258, fn. 5 (2007); Hertz Corp., 319 NLRB 597, 599 (1995). See also Trim Corp., 349 NLRB 608 (2007) (information request concerning the existence of an alleged alter-ego operation is not presumptively relevant).

To demonstrate relevance, the General Counsel must present evidence either (1) that the Union demonstrated the relevance of information not related to the bargaining unit or, (2) that the relevance of the information not related to the bargaining unit should have been apparent to the Employer under the circumstances. See Allison Co., 30 NLRB 1363 n.23 (2000); Brazos Electric Power Cooperative, Inc., 241 NLRB 1016, 1018-19 (1979) enf'd. in relevant part 615 F.2d 1100 (8th Cir. 1980). The explanation of relevance "must be made with some

[5] There is no dispute that the Union's request for information regarding the scope of services provided by DirectSat to DirecTV pursuant to the HSP Agreement was relevant to negotiations. Therefore, DirectSat provided the relevant pages of the HSP Agreement.

precision, and a generalized, conclusory explanation is insufficient to trigger an obligation to supply information." Disneyland Park, 350 NLRB 1256, 1258 n.5 (2007) (citations omitted). Because the Union has failed to make the required showing of relevance, and no relevance was apparent on the face of the Union's requests, DirectSat was not obligated to provide a full, un-redacted copy of the HSP Agreement. See Island Creek Coal, 292 NLRB 480, 490 fn. 19 (1989) ("Although the relevance of the Union's unexplained request for a copy of the merger documents might have been apparent in another context, here it must be remembered that the [Union] already had demanded and received portions of those documents that it had indicated must be supplied . . . [W]e find that, given the lack of explanation, as well as the relative remoteness in time of the requested information, the Union had not demonstrated the relevance of those documents.").

The Union has failed to articulate a "reasonable belief supported by objective evidence" that would satisfy its burden to establish that its request for the full HSP Agreement was relevant to terms and conditions of bargaining unit employees and demonstrate that Respondent must provide a full, un-redacted copy of the HSP Agreement. Indeed, the Union's shifting theories for its purported need for the full HSP Agreement undermines its claim that the full HSP Agreement was relevant to negotiations. See, e.g., Time Inc., 2016 NLRB LEXIS 574 (N.L.R.B. Aug. 9, 2016) (ALJ found the Employer did not violate 8(a)(5) of the Act where the Union changed its reason for wanting requested non-unit information now claiming the information was relevant for a different purpose, and the ALJ "doubt[ed] that [the new] asserted reason was genuine" where the Union, when pressed why it was seeking the information, stated "it was being sought to determine what chance the [Union] would have in being able to solicit nonunit employees to sign cards authorizing the Union to represent them [and therefore] the real

reason was not for the purpose of bargaining; rather it was for the purpose of organizing.").

Initially, in November 2015, the Union claimed it sought the entire HSP Agreement because it was referenced in DirectSat's New Products Lines Proposal. The Union offered no objection when DirectSat provided the *relevant* provisions of the HSP Agreement. Then in February 2016 the Union claimed it sought the entire HSP Agreement because the Union needed to understand the relationship between DirecTV and DirectSat and shared work. In response, Simon advised the Union there was no "shared" work, and the Union offered no objection. Next, in March 2016 and April 2016, the Union claimed it sought the entire HSP Agreement again because it was referenced in DirectSat's New Products Lines Proposal.[6] Simon reminded Webster that Respondent already had provided the relevant portions of the HSP Agreement and again the Union offered no objection.

Then, in May 2016, the Union changed course once again and stated it was requesting the entire HSP Agreement so it could "evaluate the extent of control of DirectSat by

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[6] On April 5, 2016, Webster emailed Simon stating in part:

> I would also like to request **information and relevant documents to show how the technician's scorecard is determined Not [sic]only the metrics, but how the metrics are determined and by whom . . .**

(JSF ¶ 27; JSF Ex. 18). The basis for the Union's request was the Employer's explanation during bargaining that, although not required to do so by its HSP agreement, in establishing performance metrics of technicians, it took its own performance standards into consideration. Webster's April 5th email continued:

> The union requests a FULL copy of the HSP agreement between DirectSat & DirecTV particularly because of the reference n [sic] the New Product Lines proposal.

On April 6, 2016, Simon, responded to Webster via email providing each of the "current metrics established by DirecTV to measure the performance of DirectSat." (JSF ¶ 28; JSF Ex. 19). The document Simon produced was four pages of the HSP Agreement setting forth the metrics established by DirecTV to measure the performance of DirectSat (which is where such metrics are stated). The portions of the HSP Agreement Simon produced were *not* in response to Webster's repeated request on April 5th for a fully copy of the HSP Agreement because the Union was not entitled to a full copy of the HSP Agreement. If the Union believed Respondent's request was incomplete, it certainly never advised Respondent. Indeed, Respondent believed the Union had the information it needed to bargain because the Union never stated Simon's April 6th response was inadequate or why.

DirecTV/AT&T." But the Union never offered any explanation of why or how the suspected control of DirecTV over DirectSat was relevant to negotiations. Indeed, to this day DirectSat has not been advised of the Union's explanation. In any event, in response to Webster's May 19, 2016 request, Simon explained to Webster that the entire, un-redacted HSP Agreement was not relevant to negotiations because wage, hours and other terms and conditions of employment are exclusively controlled by DirectSat. Simon explained to Webster that DirecTV does not have any control over the wages paid to DirectSat's employees or the metrics used to evaluate the performance of bargaining unit employees, and these decisions are vested *exclusively* in the control of DirectSat. (JSF, Ex. 22). There is no evidence to the contrary in the stipulated factual record.

The stipulated record is devoid of any facts demonstrating that the relevance of the full HSP Agreement should have been apparent to DirectSat under the circumstances. The Board has found that where circumstances surrounding a request are reasonably calculated to put the employer on notice of a relevant purpose which the union has not specifically articulated, the employer may be obligated to divulge the requested information. Amphlett Printing Company, 237 NLRB 955 (1978). However, the cases in which the Board has reached such a finding demonstrate obvious surrounding circumstances not contained in this stipulated factual record.

For example, in Piggly Wiggly Midwest LLC, 357 NLRB 2344 (2012), the Board held the employer violated the Act by failing to provide sales and franchise agreements and information about equipment transactions between the employer and franchisees. The record in Piggly Wiggly Midwest, however, established that the employer had previously informed the union that one of the franchisees was the current manager of a store it was purchasing and announced to the public that the stores would continue to operate in the same manner as before

the sales, with the same name, logo, and advertisements. Id. at 2344. The employer also had described the sale to the franchisee as "seamless," said that store customers would not notice a difference once the stores were franchised, and stated that it would continue to have "some agreements" with the franchise stores relating to requirements of purchasing goods from the employer's warehouses. Id. In addition, the record established that the Union had observed one of the employer's managers reviewing employment applications for the franchisees. Id. The Board found the union's failure to articulate its factual basis for requesting non-unit information related to the relationship between the employer and its franchisees did not absolve the employer of its obligation to produce such information because it "should have been apparent to the employer that the union had a reasonable basis to suspect that the franchisees and the employer had sufficiently similar business purposes, management, operations, equipment, supervision and ownership to constitute alter egos." Id. at 2345.

However, the Board has long recognized that an employer is not obligated to honor a union's request for information when such request lacks both specificity and clarity and when the employer could not have been aware of the intent and purpose of the union's request. See, e.g., Rodney and Judith Adams, d/b/a Adams Insulation Company, 219 NLRB 211 (1975). Although one of the Union's proffered reasons for seeking the full HSP Agreement was to "evaluate the extent of control of DirectSat by DirecTV/AT&T" there is nothing in the record even remotely showing any objective basis for the Union's fishing expedition or that it should have been apparent to DirectSat that the Union had a reasonable basis to suspect that DirecTV controlled DirectSat.[7] In fact, the record establishes the opposite. Indeed, on May 23, 2016,

[7] Given the lack of any cogent explanation from the Union or an apparent basis on the face of its request for the complete HSP Agreement, DirectSat is left to speculate that the Union sought to investigate whether a joint employer relationship exists between DirecTV and DirectSat under the standards established by the Board in Browning Ferris Industries of California, Inc., 362 NLRB No. 186 (Aug. 27, 2015).

Simon advised Webster wages, hours and other terms and conditions of employment are exclusively controlled by DirectSat, DirecTV does not have any control over the wages paid to DirectSat's employees or the standards used to evaluate the performance of bargaining unit employees and these decisions are vested *exclusively* in the control of DirectSat.

Even assuming *arguendo* an alleged joint employer relationship is the basis for the Union's conduct, it is insufficient as a matter of law to require DirectSat to provide the HSP Agreement because the Union must have a reasonable objective factual basis to seek the information requested. On this record, there is none. While the Board's standard for evaluating information requests is a broad discovery-type standard, the standard is not nonexistent. There must be some objective facts to establish a reasonable belief. See, e.g., Dodger Theatricals Holdings, 347 NLRB. 953, 967 (2006) (where the Board affirmed the ALJ's findings, and the ALJ stated: "I note that a number of Board cases, phrase the burden on unions in such cases as needing only to establish a 'reasonable belief' that the information is relevant, without adding the requirement that it must also be based on objective factors . . . However, an examination of the facts in these cases reveals the existence of such objective facts, in order to establish the Union's 'reasonable belief.' In my view, the added requirement of objective facts to establish 'reasonable belief' is meant to make clear that the union's belief cannot be construed as 'reasonable', where it is not based on objective facts, but rather, suspicion, surmise conjecture or speculation). See also Sheraton Hartford Hotel, 289 NLRB 463 (1984) (finding that where the information does not concern matters pertaining to the bargaining unit, the Union must show that the information is relevant and to satisfy the burden the union must offer more than mere suspicion for it to be entitled to the information). For example, Cannelton Industries, Inc., 339 NLRB 996, 997 (2003), which arose in the context of a request for information based on a *single employer/alter*

ego theory, the Board acknowledged that the Union may not have initially demonstrated the relevance of previously requested non-unit information and the existence of evidence that gave rise to a reasonable belief of the relevance of that information, but the Union ultimately provided nine *specific objective* factors why it had a reasonable belief that a single employer/alter ego relationship existed. Here, the stipulated factual record is devoid of any evidence demonstrating even a single objective factor the Union offered to support a reasonable belief that DirectSat and DirecTV and/or DirectSat are joint employers.

Here, there are absolutely no objective facts the Union has or can point to which establish a reasonable belief of a joint employer relationship. Accordingly, DirectSat was not obligated to provide the full, un-redacted HSP Agreement.

VII. CONCLUSION

Respondent provided the Union with those portions of the HSP Agreement that were relevant to negotiations. Specifically it provided that section of the HSP Agreement describing the services DirectSat provides to DirecTV which was directly relevant to DirectSat's New Product Lines proposal. The record does not evidence that the Union ever stated to Respondent that it believed the redacted sections of the HSP Agreement were insufficient or why they were insufficient.

The record also does not establish that the Union was entitled to the HSP Agreement to evaluate the extent of control of DirecTV over DirectSat. Assuming, arguendo, the Union sought the full HSP Agreement to explore whether a joint employer relationship existed between DirecTV and DirectSat, the record fails to set forth any objective factors substantiating a reasonable basis to conclude that Respondent and DirecTV operate as joint employers. The record does not contain any evidence that Respondent asserted it cannot agree to a proposal on any issue because DirecTV might disapprove, or that Respondent is unable to enter

into a collective bargaining agreement with the Union subject to approval by DirecTV. In fact, record establishes the opposite: that DirecTV does not have any control over the wages paid to DirectSat's employees or the metrics used to evaluate the performance of bargaining unit employees, and these decisions are vested exclusively in the control of DirectSat.

Accordingly, Respondent's refusal to provide a full un-redacted copy of the HSP Agreement did not violate the Act and the charge should be dismissed.

Respectfully submitted,

JACKSON LEWIS P.C.

Eric P. Simon
Douglas J. Klein

Dated: May 26, 2017
New York, New York

4853-1063-1241, v. 1

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

DIRECTSAT USA, LLC

and **Case 13-CA-176621**

IBEW, LOCAL 21

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

I. ISSUE

The only issue in this case is whether Respondent violated Section 8(a)(5) of the Act by failing and refusing to provide the Union with a full un-redacted copy of the Home Service Provider Agreement ("HSP Agreement") between DirecTV Inc. and DirectSat.

II. LEGAL STANDARD

The Act requires an employer to provide, on request, potentially relevant information to a Union so that it can perform its duties as collective-bargaining representative. The Union in negotiating a new collective-bargaining agreement with Respondent learned of this HSP agreement through one of Respondent's own proposals. (Jt. M. pp. 4; Jt. Ex. 11) In light of this proposal, the Union needs to determine (1) the method by which the bargaining unit employees and contract technicians are paid; (2) to determine whether DirecTV is a joint employer for the purpose of collective bargaining; and thus (3) to determine the extent of control by DirecTV over the hours, wages and working conditions of the bargaining unit technicians and contract technicians.

Under Section 8(a)(5) and 8(d) of the Act, an employer is required to furnish a union, on request, with sufficient relevant information to enable it to represent employees effectively in

administering a collective-bargaining agreement. *Pittston Coal Group, Inc.*, 334 NLRB 690 (2001). When the information sought concerns employees outside of the bargaining unit, the union must show the relevance and necessity of the information. The union's burden, however, is not an exceptionally heavy one. The standard governing an employer's duty to provide information is akin to a liberal "discovery-type standard." Thus, the union must show only a "probability that the desired information is relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." *Id.* at 692. In the present case, the liberal discovery type standard is essential as the Respondent's redactions make it impossible for the Union to determine whether the information sought is sufficient or not.

Counsel for the General Counsel argues that the Union is entitled to a full un-redacted copy of the HSP agreement to resolve its concern as to whether Respondent and DirecTV are joint employers. (See Jt. Mt. pp. 5; Ex. 14) A joint employer relationship exists where companies amounting to independent legal entities have chosen to handle jointly important aspects of their employer-employee relationship. *David Saxe Productions, LLC*, 364 NLRB No. 100 (2016). The standard in a joint employer finding is two entities exert significant control over the same employees, and where it can be shown that these two entities share or co-determine matters governing their essential terms and conditions of employment. *Id.* A joint employer must meaningfully affect matters relating to employment such as hiring, firing, discipline, supervision and direction.

The Respondent's reference to DirecTV reasonably led the Union to believe DirecTV exercises significant control over Respondent and the terms and conditions of its employees. Respondent argues *Cannelton Industries*, 339 NLRB 996 (2003) supports their position that the union has not articulated any objective factors to support a reasonable belief that DirecTV and

Respondent are joint employers. However, "under current Board law, the union is not obligated to disclose those facts to the employer at the time of the information request." *Id.* at 997, (citing *Baldwin Shop 'N Save*, 314 NLRB 114, 121 (1994); *Corson & Gruman*, 278 NLRB 329, 333-334 fn. 3 (1986)). Rather, it is sufficient that the General Counsel demonstrate at the hearing that the union had, at the relevant time, a reasonable belief that the two entities are joint employers. Ultimately, it is the Board's role, not the Respondent's, to act as the arbiter of whether the Union's evidence supports a reasonable belief. The Union's belief, even if ultimately proved wrong, was reasonable and objectively based at the time they made the request. The Union is entitled to see evidence that the relationship between DirecTV and Respondent is indeed what Respondent, through its counsel, Eric Simon, alleges it to be. Therefore, it is precisely the furnishing of this information that will put the issue to rest.

The Board's current position regarding the determination of joint employer status was set forth in *Browning-Ferris Industries of California*, 362 NLRB No. 186 (2015) The Board has held that two or more entities are joint employers if they "share or codetermine those matters governing the essential terms and conditions of employment." The Board has held that those "essential terms and conditions include but are not limited to factors such as the "direction" of the workforce. The Board has further held that "direction" of the workforce need not be direct but whether a joint employer may indirectly exercise a measure of control over the terms and conditions of employment. It is evident to the Union that the "financial" arrangements between Respondent and Direct TV may be directly related to the amount or the efficiency of TV installation and servicing work performed by the technicians in the Union's bargaining unit. Moreover, the Board noted in *Browning-Ferris* that "the way the separate entities have structured their commercial relationship is relevant to the joint-employer inquiry." *Browning-Ferris*, 362

NLRB No. 186, slip op. at 13 fn 68. Obviously, the contract between the parties is the best evidence of the way the entities have structured their relationship.

Given the liberal discovery type standard for the duty to furnish information, and the reasonableness of the Union's belief that Respondent and DirecTV are joint employers, based on Respondent's own bargaining proposal, Respondent violated Section 8(a)(5) by refusing to provide an unredacted version of its contract with DirecTV.

III. FACTS AND ANALYSIS[1]

Respondent provides service and installation of satellite television equipment for DirecTV Inc. ("DirecTV"), a satellite television service provider. (Jt. M. pp. 3) On February 11, 2014, the Union was certified as the exclusive collective-bargaining representative of the Installation/Service Technicians located at 9951 W 190th St, Mokena, Illinois. (Jt. M. pp. 3) From September 4, 2014, through May 2016, the parties held approximately 24 bargaining sessions for a first contract and reached tentative agreements on non-economic issues. (Jt. M. 4) At all material times, the Eric Simon held the position of Respondent's Counsel and has been an agent of Respondent within the meaning of Section 2(13) of the Act. (Jt. M. 3)

On November 4, 2015, Respondent presented the Union with Proposal No. 78 entitled, "Replaces Company Proposal No. 74, New Product Lines" containing the following language: "In the event the Employer is engaged with respect to product or services other than ***those pursuant to its Home Service Provider agreement with DirecTV***…" (Jt. M. pp.4; Jt. Ex. 11)

[1] On April 10, 2017, Counsel for the General Counsel, Respondent, and the Union submitted a Joint Motion and Stipulation of Facts to Administrative Law Judge Charles J. Muhl. Counsel for the General Counsel asserts that the record evidence and case law persuasively supports the argument that Respondent violated Section 8(a)(1) and (5) of the Act, as alleged. References to the Joint Motion and Stipulation of Facts will be designated as (Jt. M. p.) and references to Joint Exhibits will be designated as (Jt. Ex.).

In response to the Respondent's Proposal No. 78, on November 23, 2015, the Union through Business Representative Dave Webster ("Webster"), via email, made an information request to Respondent which provided in part: "one of the company proposals references the HSP agreement with DTV. We'd like a copy of the agreement referenced in the proposal." (Jt. Mt. pp. 4-5; Jt. Ex. 12)

On December 4, 2015, Respondent through Human Resources Director Lauren Dudley ("Dudley") responded to the Union via email regarding the information requested by providing a heavily redacted copy of only three pages of the HSP Agreement. (Jt. Ex. 13). The three pages provided constituted only a portion of the entire HSP Agreement.

On February 16, 2016, the Union through Business Representative Webster, via email, made an information request to the attorney for Respondent, Eric P. Simon, which states:

> I have heard that AT&T has extended the DirecTV contract with DirectSat for another 3 years. With AT&T & DirectSat both Installing the DirecTV Dish we need to understand the relationship between AT&T & DirectSat and the shared work. Please send a copy of the current agreement between DirectSat & AT&T/DTV for use in bargaining. (Jt. Mt. pp. 5; Ex. 14)

On February 20, 2016, Simon sent an email to Webster in response to the information request which states as follows:

> We have no idea what you have heard or whom you have heard it from, but your "information" is erroneous. DirectSat has entered into no new agreements with AT&T. In early 2015, DirecTV extended its contract with DirectSat through 2018, but there has been nothing further.
>
> As to the substance of your request, you seem to assert is relevant because you believe DirecTV (I assume you refer to AT&T because of the recent acquisition of DirecTV by AT&T) and DirectSat have "shared" work. Again, you are mistaken. There is no "shared" work. As far as DirectSat is concerned, all of the work is DirecTV's. DirecTV currently has, and always has had, the right to contract as much or as little or none of its satellite TV system installation and service work to DirectSat as it, in its sole discretion, may decide. DirectSat only performs the work that DirecTV authorizes it to perform. DirectSat has never had an exclusive right to install/service DirecTV systems. Just as DirecTV had the

> ability to decide to whom it would contract with or if it would contract out installation/service work at all prior to the AT&T-DirecTV merger, DirecTV (even as a subsidiary of AT&T) continues to determine what and how much work to contract out. This is not an issue DirectSat has any control over or ever had any control over, and as such is not a mandatory subject of bargaining. Bargaining unit work has been and will continue to be the installation and service of DirecTV systems to the extent and degree DirecTV authorizes DirectSat to perform such work. While Local 21 may have an issue with DirecTV's subcontracting of such work, it is not relevant to our negotiations. (Jt. M. pp. 5-6; Jt. Ex. 15)

Because the HSP provided by Respondent about December 4, 2015, was heavily redacted, comprised of only a portion of the entire HSP Agreement, and was insufficient to provide the Union with information it required for bargaining, Webster renewed the Union's information request on March 18, 2016, via email to Simon again requesting a "FULL" copy of the HSP Agreement. Webster explained the Agreement was necessary because of the reference by the Respondent in the New Product Lines proposal. (Jt. M. pp. 6; Jt. Ex. 16)

On March 22, 2016, the parties held a bargaining session during which Simon acknowledged the Union's request for a full copy of the HSP Agreement. Simon stated that the relevant portions of the DirecTV contract had been provided and "did not see the relevance for the entire HSP agreement." (Jt. M. pp. 6; Jt. Ex. 17) Because Webster had received no response to his request for a full copy of the HSP Agreement, about April 5, 2016, Webster again emailed Respondent through Simon renewing his request for a full copy of the HSP agreement. (Jt. M. p. 6; Jt. Ex. 18)

On April 6, 2016, Respondent through Simon responded via email providing once again the same heavily redacted copy of the HSP Agreement. In addition, Respondent at this time provided a redacted copy of an amendment to the HSP Agreement. (Jt. M. pp. 6; Jt. Ex. 19)

Based upon Respondent's failure and refusal to provide a readable and useable copy of the full HSP Agreement, on May 19, 2016, the Union via email, for a fourth time, renewed its request for a "FULL" copy of the HSP Agreement. (Jt. M. pp. 6; Jt. Ex. 20)

In response to the Union's May 19, 2016, email request, Respondent through Simon responded via email stating all relevant information had been provided [and] saw no reason to supplement their response. (Jt. M. pp. 6; Jt. Ex. 21) On May 23, 2016, Respondent's attorney Simon faxed a letter to Webster asserting that the full copy of the HSP Agreement to evaluate DirecTV's control over DirectSat was irrelevant to negotiations between Respondent. Simon added Respondent had already provided the Union with those portions which may have some relevance to negotiations-the scope of work and metrics used to evaluate performance metrics for unit technicians. (Jt. M. pp. 7; Jt. Ex. 22)

To date Respondent has not provided the Union with a full, un-redacted copy of the HSP agreement. (Jt. M. pp. 7)

Respondent's November 4, 2015, proposal on new product lines clearly raised the issue of its relationship with DirecTV. This proposal made clear that the bargaining unit work was defined by the relationship between Respondent and DirecTV. Respondent's reply to the Union—that the work was DirecTV's and they could contract as much or as little as it wished to Respondent—is misleading and disingenuous. The Union's purpose for requesting the information is not to know how much work DirecTV is providing Respondent, but rather to know the terms of the provision of work, however much or little of the work DirecTV assigns to Respondent. In other words, the Home Service Provider agreement defines the commercial relationship between the two entities, and is relevant to demonstrate to the Union whether Respondent and DirecTV are joint employers. Given the multi-factor joint employer analysis,

redacting the bulk of the HSP agreement conceals much of the details of that relationship. Accordingly, it is relevant to the Union's duty to bargain, and should have been provided.

It is impossible to point to any specific area of the inquiry into joint employer status as being one that is missing from DirectSat's three-page excerpt of the HSP Agreement. Since the HSP Agreement was so heavily redacted, one cannot say that there are provisions regarding wages, supervision, and other incidents of DirecTV's right to control of the work. But even if *none* of those incidents are discussed in the HSP Agreement, there would still be a duty to provide it. Rather than taking Respondent's word on the matter, the Union is entitled to test Respondent's apparent assertion that DirecTV and it are separate entities. So in the event that the HSP contained no provisions on the myriad factors of the right to control, Respondent, having raised the issue, would be obligated to prove its contention by providing the document to the Union.

IV. CONCLUSION

Based on the record as a whole, and for the reasons discussed above, Counsel for the General Counsel submits that Respondent unlawfully failed and refused to provide the Union information that is necessary and relevant for collective bargaining. Rather, Respondent simply provided the Union with a heavily redacted portion of the information. Board precedent clearly dictates that Respondent's approach does not satisfy its obligations under the Act. It is critical to note that the Employer did not seek an additional accommodation from the Union. It is respectfully requested that the Administrative Law Judge so find and order appropriate remedies for Respondent's blatant violation of Section 8(a)(1) and (5) of the Act.

V. PROPOSED ORDER

Counsel for the General Counsel urges the Administrative Law Judge to consider the attached proposed order.

VI. PROPOSED NOTICE

Counsel for the General Counsel urges the Administrative Law Judge to consider the attached proposed Notice to Employees as part of the remedy in this case.

Dated at Chicago, Illinois this 26th day of May 2017.

Respectfully submitted,

/s/ Elizabeth S. Cortez
Elizabeth S. Cortez, Attorney
Counsel for the General Counsel
National Labor Relations Board, Region 13
Dirksen Federal Building
219 S. Dearborn Street, Suite 808
Chicago, IL 60604
(312)-353-4174
elizabeth.cortez@nlrb.gov

CERTIFICATE OF SERVICE

I hereby certify that on the 26th of May 2017, I electronically filed the attached Counsel for the General Counsel's Brief to the Administrative Law Judge with the National Labor Relations Board's Division of Judges and served all parties by mailing true copies thereof by electronic mail today to the following at the addresses listed below:

Douglas J. Klein, Attorney
JACKSON LEWIS P.C.
666 Third Avenue
New York, NY 10017
Email: kleind@jacksonlewis.com

Gilbert Cornfield, Attorney
CORNFIELD AND FELDMAN LLP
25 East Washington Street
Suite 1400
Chicago, IL 60602
Email: gcornfield@cornfieldandfeldman.com

Respectfully submitted,

/s/ Elizabeth S. Cortez
Elizabeth S. Cortez
Counsel for the General Counsel
National Labor Relations Board, Region 13
Dirksen Federal Building
219 S. Dearborn Street, Suite 808
Chicago, IL 60604
Email: elizabeth.cortez@nlrb.gov

PROPOSED ORDER

Respondent, DirectSat USA, LLC, LLC, its officers, agents, successors, and assigns shall:

1. Cease and desist from

(a) Failing or refusing to bargain collectively and in good faith with the International Brotherhood of Electrical Workers, Local 21 (the Union) by failing to provide the Union with requested information relevant to the Union's ability to represent the bargaining unit employees at its Mokena, Illinois facility.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the National Labor Relations Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act:

(a) Bargain collectively and in good faith with the Union, the exclusive collective-bargaining representative of the Unit, with regard to requests for information.

(b) Supply the Union with requested information that is necessary for, and relevant to, the Union's representation of the employees in the Unit.

(c) Supply the Union with the following information requested on March 18, 2016 and again on May 19, 2016: "full copy of the Home Service Provider Agreement between Respondent and DirecTV."

(d) Within 14 days of service by the Region, post at the Mokena, Illinois facility copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by Region 13, after being signed by Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Respondent will take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Within 21 days after service by the Region, file with the Regional Director a Sworn certification of a responsible official on a form provided by the Union attesting to the steps that Respondent has taken to comply.

Proposed Notice

(To be printed and posted on official Board notice form)

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to provide your Union, IBEW Local 21, with information that is relevant and necessary to its role as your bargaining representative.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL promptly provide the Union with a full copy of the Home Service Provider Agreement between DirectSat and DirectTV that it requested beginning on March 18, 2016, and requested again on May 19, 2016.

DIRECTSAT USA, LLC
(Employer)

Dated: _____ **By:** _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlrb.gov.

Dirksen Federal Building
219 South Dearborn Street, Suite 808
Chicago, IL 60604-2027

Telephone: (312)353-7570
Hours of Operation: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 13

DIRECTSAT USA, LLC.	:	
	:	
Respondent	:	
	:	
and	:	**Case No. 13-CA-176621**
	:	
	:	
IBEW, LOCAL 21	:	
	:	
Charging Party	:	

RESPONDENT'S MOTION TO STRIKE PORTIONS OF CHARGING PARTY'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

Pursuant to Rule 102.24 of the Board's Rules and Regulations ("Rules"), DirectSat USA, LLC, ("DirectSat" or the "Respondent") hereby moves to strike the following portions of IBEW, Local 21's ("Charging Party" or the "Union") Brief to the Administrative Law Judge (ALJ) because they are based on matters which are not part of the record[1] as defined in Section 102.45(b) of the Rules, and, therefore, not part of the record before the ALJ:

1. Section entitled "How A Technician's Earnings Are Determined" beginning on page 5 of Charging Party's brief;
2. Section entitled "The Possible Joint Employer Status of DirectSat and DirecTV" beginning on page 7 of Charging Party's brief; and
3. Copy of the United States Court of Appeals for the Fourth's Circuit's decision in Hall v. DirecTV, LLC, et al., No. 15-1857, No. 15-1858 (4th Cir., 2017).

In its post-hearing brief, Charging Party offers factual assertions and conclusions based on evidence not contained in the stipulated factual record. Specifically, in support of its

[1] Citations to the Joint Stipulation of Facts are cited as (JSF ¶ __). Exhibits are cited as (JSF, Ex. __).

argument why the Home Service Provider Agreement ("HSP Agreement") between DirecTV, Inc.[2] and DirectSat is relevant to its representation of the bargaining unit, Charging Party offers arguments about the metrics used by DirecTV to evaluate DirectSat performance. But there is nothing in the stipulated facts concerning the metrics used by DirecTV to evaluate DirectSat performance and the relevance of the HSP Agreement or the Union's request for a full copy of it. The Complaint does not even allege that Respondent failed to respond to the Union's information request regarding the metrics. Accordingly, those portions of Charging Party's Brief to the ALJ concerning metrics used by DirecTV to evaluate DirectSat performance and the HSP Agreement must be stricken.

Charging Party also claims it became aware of Fair Labor Standards Act (FLSA) litigation involving allegations that DirecSat and DirecTV were joint employers, and this served as a basis for its belief of a joint employer relationship between the two. Charging Party even annexed a copy of one such decision by the U.S. Court of Appeals for the Fourth Circuit to its brief to the ALJ. This material also must be stricken because there is nothing in the stipulated facts about the Union's belief of a joint employer relationship based on federal court FLSA litigation, and the Fourth Circuit decision is not in evidence. Permitting Charging Party to offer these arguments and evidence which are outside the stipulated factual record So Ordered by the ALJ would deprive Respondent of its due process rights.

I. BACKGROUND RELEVANT TO MOTION TO STRIKE

This case was originally scheduled for a hearing before Judge Charles J. Muhl on January 9, 2017. On January 4, 2017, the Action Regional Director for Region 13 postponed the

[2] Respondent services and installs satellite television equipment for DirecTV, a satellite television service provider. (JSF ¶ 7).

hearing indefinitely to allow the parties to prepare a stipulated record.[3] Between January 4, 2017 and April 10, 2017, the parties jointly prepared a stipulated factual record and exhibits. On April 10, 2017, pursuant to Rule 102.35(A)(9), of the Board's Rules and Regulations, Counsel for the General Counsel, Respondent and the Union filed a Joint Motion and Stipulation of Facts to ALJ Muhl. On April 14, 2017, ALJ Muhl issued an Order Granting the Joint Motion, Approving the Stipulation of Facts, and Settling Briefing Schedule ("Order").[4] The Order stated:

> In the motion, the General Counsel, the Respondent, and the Charging Party seek to submit an agreed-upon record to me for issuance of a decision, including findings of fact, conclusions of law, and a recommended order. **The decision would be based upon the stipulation of facts and exhibits therein**, as well as briefs to be submitted by the parties. The parties also state that they waive their right to a hearing.
>
> Having reviewed the proposed record, I grant the joint motion and approve the stipulation of facts. Briefs may be filed with the Division of Judges in Washington, DC, no later than May 19, 2017.[5]

On May 25, 2017, Charging Party served its Brief to the ALJ, which included the portions Respondent seeks to strike. On May 26, 2017, Counsel for the General Counsel served their Briefs to the ALJ.

II. ARGUMENT

The Board has long recognized that where the parties agree to stipulated facts, matters outside the stipulation shall be stricken from parties' briefs and only the stipulated factual record shall be considered. See, e.g., Ohio Brass Co., 261 NLRB 137, 137 fn. 1 (1982) ("[the post-hearing] brief to the Board set forth a number of alleged facts which were not included in the parties' original agreed-upon stipulation . . . [and therefore w]e grant the []

[3] A copy of the Action Regional Director's January 9th Order is attached as Exhibit "A" (emphasis added).
[4] A copy of ALJ Muhl's April 14, 2017 Order is attached as Exhibit "B."
[5] The deadline to file briefs was later extended until May 26, 2017. See Exhibit "C."

motion [to strike] and consider herein only those facts included in the parties' original stipulation of facts."). Indeed, "[t]o do otherwise would defeat the purpose of having a stipulated record in lieu of a hearing and deprive [Respondent] of due process by not allowing [] the opportunity of rebuttal." U.S. Xpress Enter., Inc., 363 NLRB No. 46 at *18-*19 (2015).

The Board takes employers' due process rights seriously. It has not hesitated to affirm administrative law judges' decisions granting motions to strike post-hearing briefs that raise new allegations or offer evidence outside the factual record. See, e.g., K-Mart Corp., 336 NLRB 455, 458 (2001) (affirming an administrative law judge's decision granting an employer's motion to strike a portion of the General Counsels' post-hearing brief because the employer did not have a full and fair opportunity to litigate new matters raised for the first time in the General Counsel's post-hearing brief). See also Utility Workers Union of America, 356 NLRB No. 158 (2011) (affirming an ALJ's decision striking portions of post-hearing brief relying on statements outside the factual record and striking exhibits annexed to the post-hearing brief because the documents were not introduced in the proceeding).

The stipulated factual record is clear. The Union requested a full copy of the HSP Agreement in connection with two discrete issues. The first on March 18, 2016 was in response to a proposal by DirectSat regarding the definition of unit work, which made a specific reference to services provided by DirectSat to DirecTV pursuant to the HSP Agreement. The second was on May 19, 2016, when the Union proffered a new rationale for its request for the full HSP Agreement to evaluate the degree of "control" by DirecTV over DirectSat.

To support its argument that the HSP Agreement is relevant to its representation of the bargaining unit, in its Brief to the ALJ, Charging Party offers arguments about the metrics used by DirecTV to evaluate DirectSat performance to support its claim that the HSP Agreement

is relevant. See Charging Party's Brief to the ALJ at 5-7. However, there is nothing in the stipulated factual record about the Union's request for the metrics used by DirecTV to evaluate DirectSat performance or how they relate to the HSP Agreement (let alone establish its relevance). See generally JSF ¶¶ 7-33.[6] In fact, the Complaint does not even allege that Respondent failed to respond to the Union's information request regarding the metrics (see generally JSF, Ex. 4). Therefore, this material is irrelevant, prejudicial, falls outside the stipulated factual record and should be stricken.

Also in support of its argument that the HSP Agreement is relevant to its representation of the bargaining unit, in its Brief to the ALJ, Charging Party states that it became aware of FLSA litigation involving allegations that DirecSat and DirecTV were joint employers, and this served as a basis for its belief of a joint employer relation. See Charging Party's Brief to the ALJ at 7-9. Charging Party also attaches one such decision issued by the U.S. Court of Appeals for the Fourth Circuit, Hall v. DirecTV, LLC, et al., No. 15-1857, No. 15-1858 (4th Cir., 2017). But there is nothing in the stipulated facts or exhibits thereto regarding the Hall decision

[6] Charging Party's Brief to the ALJ confuses the Union's request for the performance standards DirecTV utilizes to evaluate DirectSat performance with its requests for a full copy of the HSP Agreement. However, this confusion is not an excuse for the Union to be permitted to introduce extraneous facts and evidence. As fully addressed in Respondent's Brief to the ALJ, on April 6, 2017, Respondent provided the Union with the current metrics established by DirectSat to measure the performance of DirectSat. (JSF ¶ 28; JSF Ex. 19); see generally Respondent's Brief to the ALJ at 12-13. The document Respondent produced happened to be four pages of the HSP Agreement because that is where such metrics are stated. This portion of the HSP Agreement which Respondent produced was *not* in response to the Union's repeated request on April 5, 2017 for a fully copy of the HSP Agreement because the Union was not entitled to a full copy of the HSP Agreement. If the Union believed Respondent's response was incomplete, it certainly never advised Respondent. Indeed, Respondent believed the Union had the information it needed to bargain because the Union never stated Respondent's April 6, 2017 response was inadequate or why. See generally Respondent's Brief to the ALJ at 12-13.

or any other FLSA litigation for that matter. This line of argument and extraneous evidence must be stricken as it falls outside the stipulated factual record.[7]

What makes Charging Party's inclusion of factual assertions and conclusions based on evidence not contained in the stipulated record particularly surprising (or egregious) is that neither Charging Party nor Counsel for the General Counsel ever even asked Respondent during the time the parties prepared the Joint Stipulation of Facts whether Respondent would agree to include the any of these extraneous facts or append the Fourth Circuit's decision in the stipulated record. Charging Party's attempt to circumvent the arm's length process in which the parties engaged agreeing to the stipulated record by sneaking additional facts and evidence into its Brief to the ALJ is, at a minimum, a blatant disregard for the legitimacy of the Board's processes.

III. CONCLUSION

For the foregoing reasons, to preserve Respondent's due process rights, the Motion to Strike should be granted in its entirety.

Respectfully submitted,

JACKSON LEWIS P.C.

Eric P. Simon
Douglas J. Klein

Dated: June 9, 2017
New York, New York

[7] Charging Party also argues that Respondent's Defense that the ULP Charge relating to the Union's November 23, 2015 request for a full copy of the HSP Agreement must be rejected. See Charging Party's Brief to the ALJ, at 12-14. This argument is irrelevant. There are only two information requests at issue in the Complaint: the March 18, 2016 information request and the May 19, 2016 information request. (JSF, Ex. 4). The Complaint does not allege a violation of the Act with respect to the Union's November 23, 2015 request. In any event, on December 4, 2015, Respondent responded to the Union's November 23, 2015 information request providing the three pages of the HSP Agreement which identified the services provided by DirectSat to DirecTV pursuant to the HSP Agreement. (JSF ¶ 22; JSF Ex. 13). There is no evidence in the record that the Union ever stated this response was inadequate or why.

CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2017, I caused a true and correct copy of the foregoing **RESPONDENT'S MOTION TO STRIKE PORTIONS OF CHARGING PARTY'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE** to be served by e-mail and UPS overnight on: (1) Charging Party, IBEW, LOCAL 21; and (2) Counsel for the General Counsel of the National Labor Relations Board, through counsels of record at the following addresses:

Gilbert A. Cornfield, Esq.
Cornfield and Feldman LLP
25 East Washington Street, Suite 1400
Chicago, IL 60602-1708
GCornfield@cornfieldandfeldman.com

Elizabeth Cortez, Esq.
Counsel for the General Counsel
National Labor Relations Board, Region 13
219 S. Dearborn St., Suite 808
Chicago, IL 60604
Elizabeth.Cortez@nlrb.gov

Douglas J. Klein

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

DIRECTSAT USA, LLC	)	
	)	
Respondent	)	
	)	
and	)	Case No. 13-CA-176621
	)	
IBEW, LOCAL 21	)	
	)	
Charging Party	)	

CHARGING PARTY'S RESPONSE TO RESPONDENT'S MOTION TO STRIKE PORTIONS OF CHARGING PARTY'S BRIEF

IBEW, Local 21, the Charging Party (the "Union"), hereby responds to Respondent DirectSat USA, LLC's (the "Employer") Motion To Strike Portions of the Union's Brief.

The Employer asserts in its Motion that the following matters referenced in the Union's Brief should be stricken because they are not based upon the Stipulated Record which has been submitted by the parties and the General Counsel to the Administrative Law Judge (ALJ):

1. "...the metrics used by DirecTV to evaluate DirectSat performance";

2. Whether DirecTV is a joint employer for the purpose

of negotiating over the hours, wages and working conditions for members of the Union's bargaining unit employed by the Employer.

The Union disagrees with the Employer's assertions that the Union's references to the above cited matters are not reflected in the Stipulated Record. The Union references the following documents which are part of the Stipulated Record in support of the Union's Response to the Employer's Motion:

1. Exhibit 12 is a letter from Union Representative Dave Webster to Employer representative Lauren Dudley on November 23, 2015 stating in part on page 1 of the letter:

> "Also referenced in a proposal are performance standards utilized by the 'Employers customer'. We'd like to see the standards that DTV is asking you to meet. To be clear, not the metrics used by DSat derived *from* the standards set by the Employers customer, but the actual standards from DTV that DSat uses to form the scorecard metrics." (Emphasis in original)

2. There was no specific response to the Union's information request. However, on February 20, 2016 Employer counsel Eric Simon wrote to Webster stating in part that:

> "...DirectSat only performs the work that DirecTV authorizes it to perform....Bargaining unit work has been and will continue to be the installation and service of DirecTV systems to the extent and degree DirecTV authorizes

> DirectSat to perform such work. While Local 21 may have an issue with DirecTV's subcontracting of such work, it is not relevant to our negotiations." (Exhibit 15).

3. On March 18, 2016 Webster wrote to Simon, prior to the scheduled March 22, 2016 bargaining session, stating, in part:

> "I would also like to request information and relevant documents to show how the technician's scorecard is determined. Not only the metrics, but how the metrics are determined and by whom. Technicians have been told in the past by Jeff Jamison that the scorecard is decided and controlled by DirecTV and I have been told by the company that the scorecard is decided and formed internally not by DirecTV.
>
> The union requests a FULL copy of the HSP agreement between DirectSat & DirecTV particularly because of the reference [i]n the New Product Lines proposal." (Exhibit 16)

We note that Webster's reference to the New Product Lines proposal is to the Employer's proposal in evidence as Exhibit 11 which states in part "In the event the Employer is engaged with respect to products or services other than ***those provided in its Home Service Provider agreement with DirecTV***, such work shall not be deemed bargaining unit work."

4. On April 5, 2016 Webster again wrote to Simon stating:

> "I would also like to request **information and relevant documents to show how the**

> **technician's scorecard is determined Not only the metrics, but how the metrics are determined and by whom.** Technicians have been told in the past by Jeff Jamison that the scorecard is decided and controlled by DirecTV and I have been told by the company that the scorecard is decided and formed internally not by DirecTV[.]
>
> The union requests a FULL copy of the HSP agreement between DirectSat & DirecTV particularly because of the reference [i]n the New Product Lines proposal." (Exhibit 18)

5. On April 6, 2016 Simon sent a redacted copy of "...the current metrics established by DirecTV to measure the performance of DirectSat." (Exhibit 19)

6. On May 19, 2016 Webster wrote to Simon, stating: "In connection with DirectSat negotiations I renew my request for a FULL copy of the HSP agreement between DirectSat and DirecTV/AT&T in addition to all current agreements with sub contractors, to evaluate the extent of control of DirectSat by DirecTV/AT&T." (Exhibit 20)

7. On May 19, 2016 Simon responded to Webster, stating: "We have already provided you with all relevant information regarding this request. We see no reason to supplement our response." (Exhibit 21)

8. On May 23, 2016 Simon wrote a more detailed response to Webster, reviewing Webster repeated requests for a "FULL copy of the HSP agreement" and referencing Webster's May 19, 2016 statement

that the request was in order "to evaluate the extent of control of DirectSat by DirecTV/AT&T." Simon then repeated the Employer's position that the Union's request for the HSP agreement "...is irrelevant to negotiations between DirectSat and Local 21 regarding terms and conditions of employment of DirectSat employees." Simon then expresses the Employer's position that DirecTV/AT&T has no control nor interest "...over the wages paid to DirectSat employees or the metrics used to evaluate the performance of unit employees." (Exhibit 22)

CONCLUSION

The issue before the ALJ is whether the Union is entitled to a full copy of the agreement between the Employer and DirecTV/AT&T. The General Counsel, by the subject unfair labor practice Complaint, is not seeking a determination by the ALJ of whether the agreement establishes standards for determining the wages and performances of members of the Union's bargaining unit and/or whether DirecTV/AT&T is a "joint employer" as defined by NLRB precedents. The issue is whether the Complaint and the Stipulated Record before the ALJ justifies the Union's right to an unredacted copy of the agreement in order for the Union, as the bargaining representative, to independently assess the extent of control over the standards used to determine the wages of the technicians in the

Union's bargaining unit. In that regard, the Union stresses again that the technicians are paid on a "piece rate" basis, based presumably upon the quantity, quality and inefficiency of the assignments to each technician and not on an hourly wage or salary.

The Court of Appeals decision which was attached to the Union's Brief to the ALJ was not intended to persuade the ALJ that DirecTV/AT&T is a joint employer within the meaning of the NLRA, but only to demonstrate that the Union's interest in independently determining the extent of control by DirecTV/AT&T over the Union's bargaining unit is of valid concern. The decision of the Court of Appeals is subject to "judicial notice" as any other reported administrative or court decision which may be relied upon by the parties.

The Union submits therefore that the Employer's Motion To Strike Portions of the Union's Brief should be denied.

Respectfully submitted,

CORNFIELD AND FELDMAN LLP

June 15, 2017

BY: Gilbert A. Cornfeld/jcg
GILBERT A. CORNFIELD

25 East Washington Street
Suite 1400
Chicago, IL 60602-1803
Phone: (312) 236-7800
F a x: (312) 236-6686

Attorneys for Charging Party

STATE OF ILLINOIS)
) SS
COUNTY OF C O O K)

AFFIDAVIT OF SERVICE

SHARON A. FARMER, being first duly sworn upon oath, deposes and states that she served the foregoing **CHARGING PARTY'S RESPONSE TO RESPONDENT'S MOTION TO STRIKE PORTIONS OF CHARGING PARTY'S BRIEF** by electronically filing same with the National Labor Relations Board's Division of Judges and by emailing and mailing a true and accurate copy of same to the following, with proper postage prepaid, on the 15th day of June, 2017:

Elizabeth S. Cortez, Counsel
For the General Counsel
NLRB Region 13
Dirksen Federal Bldg.
219 South Dearborn Street
Suite 808
Chicago, IL 60604
Email: elizabeth.cortez@nlrb.gov

Eric P. Simon, Esq.
Douglas J. Klein, Esq.
JACKSON LEWIS P.C.
666 Third Avenue
New York, NY 10017
Email: kleind@jacksonlewis.com

Sharon A. Farmer
SHARON A. FARMER

Subscribed and sworn to before
me this 15th day of June, 2017.

Beye Fyfe
Notary Public

OFFICIAL SEAL
BEYE FYFE
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES:06/25/19

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 13

DIRECTSAT USA, LLC.	:	
Respondent	:	
and	:	**Case No. 13-CA-176621**
IBEW, LOCAL 21	:	
Charging Party	:	

RESPONDENT'S REPLY IN FURTHER SUPPORT OF ITS MOTION TO STRIKE PORTIONS OF CHARGING PARTY'S BRIEF TO THE A ADMINISTRATIVE LAW JUDGE

Pursuant to Rule 102.24 of the Board's Rules and Regulations ("Rules"), DirectSat USA, LLC, ("DirectSat" or the "Respondent") submits this Reply in Further Support of its Motion to Strike ("MTS") three portions of IBEW, Local 21's ("Charging Party" or the "Union") Brief to the Administrative Law Judge (ALJ).[1] Respondent's MTS established that extraneous facts and evidence concerning metrics used by DirecTV to measure DirectSat performance and FLSA litigation involving DirectSat submitted by Charging Party in its Brief to the ALJ must be stricken because they are based on matters which are not part of the record before the ALJ as defined in Section 102.45(b) of the Rules. Charging Party's Opposition to

[1] The three portions which should be stricken are:

1. Section entitled "How A Technician's Earnings Are Determined" beginning on page 5 of Charging Party's brief
2. Section entitled "The Possible Joint Employer Status of DirectSat and DirecTV" beginning on page 7 of Charging Party's brief; and
3. Copy of the United States Court of Appeals for the Fourth's Circuit's decision in Hall v. DirecTV, LLC, et al., No. 15-1857, No. 15-1858 (4th Cir., 2017).

Respondent's Motion To Strike Portions of Charging Party's Brief to the ALJ ("Opposition") concedes that the Complaint does not allege Respondent failed to respond to the Union's information request regarding the metrics, and does not offer any basis why it is appropriate for the ALJ to consider arguments and facts about the metrics or their alleged connection to the HSP Agreement. In its Opposition, Charging Party also concedes that extraneous facts and evidence about FLSA litigation involving DirectSat are not part of the stipulated record. Accordingly, the portions of Charging Party's Brief to the ALJ concerning metrics used by DirecTV to evaluate DirectSat performance and the HSP Agreement and FLSA litigation must be stricken.

I. ARGUMENT

A. THERE IS NO BASIS TO CONSIDER FACTS AND ARGUMENTS CONCERNING METRICS USED BY DIRECTV TO EVALUATE DIRECTSAT PERFORMANCE

In its Opposition, Charging Party does not off any basis why it should be permitted to offer facts and arguments about the Union's request for the metrics used by DirecTV to evaluate DirectSat performance or how they relate to the HSP Agreement (let alone establish its relevance). See MTS at 5. Indeed, Charging Party cannot refute, based on the stipulated record, that the Union requested a full copy of the HSP Agreement in connection with two discrete issues—the definition of unit work and the degree of "control" by DirecTV over DirectSat. Charging Party apparently continues to confuse the Union's request for the performance standards DirecTV utilizes to evaluate DirectSat performance with its requests for a full copy of the HSP Agreement. But this confusion is not an excuse for the Union to be permitted to introduce extraneous facts and evidence. See generally MTS at 5 n.6.

B. CHARGING PARTY CONCEDES THAT ITS LINE OF ARGUMENT AND EXTRINSIC EVIDENCE CONCERNING FLSA LITIGATION INVOLVING RESPONDENT MUST BE STRICKEN

In its MTS, Respondent established why, as a matter of law, it was inappropriate for Charging Party to include arguments and extrinsic evidence in its Brief to the ALJ about becoming aware of FLSA litigation involving joint employer allegations against DirectSat and DirecTV because this line of argument and extraneous evidence fall outside the stipulated record. See MTS at 3-6. In its Opposition, Charging Party does not offer any legal basis why these portions of its Brief to the ALJ should be considered in deciding the underlying Charge.[2] Accordingly, all arguments and extrinsic evidence about FLSA litigation involving DirectSat must be stricken.

II. CONCLUSION

For the reasons set forth in Respondent's MTS and above, to preserve Respondent's due process rights, the MTS should be granted in its entirety.

Respectfully submitted,

JACKSON LEWIS P.C.

/s/ Douglas J. Klein

Eric P. Simon
Douglas J. Klein

Dated: June 22, 2017
New York, New York

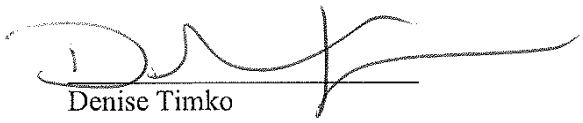
[2] In its Opposition, Charging Party states that it attached the Fourth Circuit decision not "to persuade the ALJ that DirecTV/AT&T is a joint employer within the meaning of the NLRA, but only to demonstrate that the Union's interest in independently determining the extent of control by DirecTV/AT&T over the Union's bargaining unit is a valid concern." See Charging Party's Opposition at 6. Charging Party misses the point. Charging Party's stated intentions for including a line of argument and extraneous evidence are irrelevant. The material must be stricken because it falls outside the stipulated record.

CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2017, I caused a true and correct copy of the foregoing **RESPONDENT'S REPLY IN FURTHER SUPPORT OF ITS MOTION TO STRIKE PORTIONS OF CHARGING PARTY'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE** to be served by e-mail and UPS overnight on: (1) Charging Party, IBEW, LOCAL 21; and (2) Counsel for the General Counsel of the National Labor Relations Board, through counsels of record at the following addresses:

Gilbert A. Cornfield, Esq.
Cornfield and Feldman LLP
25 East Washington Street, Suite 1400
Chicago, IL 60602-1708
GCornfield@cornfieldandfeldman.com

Elizabeth Cortez, Esq.
Counsel for the General Counsel
National Labor Relations Board, Region 13
219 S. Dearborn St., Suite 808
Chicago, IL 60604
Elizabeth.Cortez@nlrb.gov



Denise Timko

4814-2908-4746, v. 1

JD–57-17
South Holland, IL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

DIRECTSAT USA, LLC

and Case 13–CA–176621

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS,
LOCAL UNION 21, AFL–CIO

Elizabeth S. Cortez, Esq., for the
General Counsel.

Eric P. Simon, Esq. and *Douglas J. Klein, Esq.*,
(Jackson Lewis P.C.), of New York,
New York, for the Respondent.

Gilbert Cornfield, Esq. (Cornfield and Feldman
LLP), of Chicago, Illinois, for the
Charging Party.

DECISION

CHARLES J. MUHL, Administrative Law Judge. The General Counsel's complaint in this case alleges that DirectSat USA, LLC (the Respondent) unlawfully refused to provide information to Local Union 21 of the International Brotherhood of Electrical Workers, AFL–CIO (the Union). That Union represents the Respondent's installation and service technicians, who perform work for DirecTV, Inc. under a subcontract. The information at issue is a full and unredacted copy of the Respondent's contract—the "Home Service Provider" agreement—with DirecTV. The situation arose in the context of negotiations for a first contract covering the Respondent's technicians.

On April 10, 2017, the parties filed a joint motion and stipulation of facts requesting that the case be decided without a hearing and based on the stipulated record. On April 14, 2017, I granted the motion and approved the stipulation of facts via written order. Thereafter, the

parties filed briefs on May 26, 2017. Based upon those briefs and the entire stipulated record, I find that the Respondent violated the Act as alleged in the complaint.[1]

FINDINGS OF FACT

I. JURISDICTION

The Respondent is engaged in the installation and service of satellite television equipment for DirecTV, from its facility in South Holland, Illinois. In conducting its business operations during the past 12 months, the Respondent has performed services in excess of $50,000 in States other than the State of Illinois. Accordingly, I find that, at all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, as the Respondent admits in its answer to the complaint. I also find, and the Respondent admits, that the Union is a labor organization within the meaning of Section 2(5) of the Act.[2]

II. ALLEGED UNFAIR LABOR PRACTICES

On February 11, 2014, the Union was certified as the exclusive collective-bargaining representative of the Respondent's technicians, pursuant to Section 9(a) of the Act.[3] The Respondent and the Union began negotiations for a first contract on September 4, 2014. Eric Simon, an attorney, represented the Respondent in these negotiations.[4]

One of the matters the parties addressed in bargaining was whether new products or services offered by the Respondent would be deemed bargaining unit work. On various dates from November 12, 2014 through September 16, 2015, the Respondent and the Union exchanged written proposals on this topic. The Respondent proposed that such work would be outside the unit. However, at its sole discretion, the Company could assign the new work to unit employees, set their wage rates, and later remove the work without any challenge through the

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[1] On May 20, 2016, the Union initiated this case by filing the original unfair labor practice charge against the Respondent. Region 13 of the National Labor Relations Board (the Board) docketed the charge as Case 13–CA–176621. On June 13, 2016, the Union filed a first amended charge and, on September 14, 2016, the Union filed a second amended charge. On September 23, 2016, the General Counsel issued a complaint, alleging that the Respondent violated Section 8(a)(5) of the National Labor Relations Act (the Act). On October 5, 2016, the Respondent filed a timely answer to the complaint. Therein, it asserted an affirmative defense, based upon Section 10(b) of the Act.

[2] Stipulation of facts, pars. 7–10.

[3] The full description of this appropriate unit (the Unit) is:

> All full-time and regular part-time Installation/Service Technicians employed by the Employer at its facility located at 9951 W 190th St., Mokena, Illinois, 60448, but excluding all other employees, confidential employees, guards, and supervisors as defined in the Act.

The Respondent relocated the Mokena facility to South Holland in or around May 2015.

[4] The parties agree that, in that capacity, Simon was a Sec. 2(13) agent of the Respondent.

grievance and arbitration procedure. The Union, in turn, proposed having this work assigned to bargaining unit employees. It also sought to retain the right to negotiate the terms and conditions of employment related to this work. Finally, the Union proposed that it be able to submit any disagreements over the new work to the grievance procedure.[5]

The material events regarding the Union's information request at issue in this case took place from November 2015 to May 2016. First, on November 4, 2015, the Respondent submitted a revised proposal on new product lines.[6] The first sentence of that proposal stated: "In the event the Employer is engaged with respect to products or services other than ***those provided pursuant to its Home Service Provider agreement with DirecTV,*** . . . .such work shall not be deemed bargaining unit work." (Emphasis in the original.)

Then on November 23, 2015, Dave Webster, a business representative for the Union, sent an email to Lauren Dudley, the Respondent's human resources director.[7] Webster stated in relevant part: "[O]ne of the company proposals references the HSP agreement with DTV. We'd like a copy of the agreement referenced in the proposal." Dudley responded via email dated December 4, 2015.[8] As to the Home Service Provider (HSP) agreement with DirecTV, Dudley stated: "See attached, relevant to scope of work." She provided a portion of the agreement, with redactions. In the "Recitals," the unredacted provisions described the businesses of DirecTV and the Respondent. Then the "Agreement" section included an "Appointment of Contractor" provision, which stated:

> Authority. DIRECTV hereby engages [the Respondent] to provide services in the installation and maintenance of DIRECTV System Hardware (the "Services," or "Fulfillment Services" when referring specifically to initial customer installation services only) as defined herein and as identified in **Exhibit 1.a.i.** attached hereto for DIRECTV customers located in areas specified in **Exhibit I.a.ii..** attached hereto. . . .(Emphasis in the original.)

Dudley also provided the two exhibits referenced in this provision. The first gave a description of the work tasks the Respondent would perform for DirecTV under the agreement. The second contained a list of cities in which the Respondent would perform the work.

On February 16, 2016[9], Webster sent an email to Simon, which stated:

> I have heard that AT&T has extended the DirecTV contract with DirectSat for another 3 years. With AT&T & DirectSat both

[5] Stipulation of facts, pars. 16–19; Jt. Exhs. 7–10.
[6] Stipulation of facts, par. 20; Jt. Exh. 11.
[7] Stipulation of facts, par. 21; Jt. Exh. 12.
[8] Stipulation of facts, par. 22; Jt. Exh. 13.
[9] All dates hereinafter are in 2016, unless otherwise specified.

> installing the DirecTV Dish we need to understand the relationship between AT&T & DirectSat and the shared work. Please send a copy of the current agreement between DirectSat & AT&T/DTV for use in bargaining.[10]

Simon responded via email dated February 20.[11] Simon stated therein:

> We have no idea what you have heard or whom you have heard it from, but your "information" is erroneous. DirectSat has entered into no new agreements with AT&T. In early 2015, DirecTV extended its contract with DirectSat through 2018, but there has been nothing further.
>
> As to the substance of your request, you seem to assert is relevant (sic) because you believe DirecTV (I assume you refer to AT&T because of the recent acquisition of DirecTV by AT&T) and DirectSat have "shared" work. Again, you are mistaken. There is no "shared" work. As far as DirectSat is concerned, all of the work is DirecTV's. DirecTV currently has, and always has had, the right to contract as much or as little or none of its satellite TV system installation and service work to DirectSat as it, in its sole discretion, may decide. DirectSat only performs the work that DirecTV authorizes it to perform. DirectSat has never had an exclusive right to install/service DirecTV systems. Just as DirecTV had the ability to decide to whom it would contract with or if it would contract out installation/service work at all prior to the AT&T-DirecTV merger, DirecTV (even as a subsidiary of AT&T) continues to determine what and how much work to contract out. This is not an issue DirectSat has any control over or ever had any control over, and as such is not a mandatory subject of bargaining. Bargaining unit work has been and will continue to be the installation and service of DirecTV systems to the extent and degree DirecTV authorizes DirectSat to perform such work. While Local 21 may have an issue with DirecTV's subcontracting of such work, it is not relevant to our negotiations.

On March 18, Webster resent the original information request to Simon, asking for a full copy of the HSP agreement.[12] Once again, Webster noted the reference to the agreement in the Respondent's new product lines proposal. At a bargaining session on March 22, Simon

[10] Stipulation of facts, par. 23; Jt. Exh. 14. AT&T acquired DirecTV on or about July 24, 2015.

[11] Stipulation of facts, par. 24; Jt. Exh. 15.

[12] Stipulation of facts, par. 25; Jt. Exh. 16. In this communication, Webster also requested information concerning "how the technician's scorecard is determined. Not only the metrics, but how the

acknowledged the Union's renewed information request. Simon stated that the Respondent already provided the Union with the relevant portions of the HSP agreement. The Union also submitted a revised proposal regarding new product lines. That proposal retained the Respondent's earlier language referencing the HSP agreement, except that the new work was deemed bargaining unit work.

On April 5, the Union again reiterated its request for a full copy of the HSP agreement, based upon the Respondent referencing the agreement in its new product lines proposal.[13]

On May 19, Webster sent the following email to Simon:

> In connection with DirectSat negotiations I renew my request for a FULL copy of the HSP agreement between DirectSat and DirecTV/AT&T in addition to all current agreements with sub contractors, to evaluate the extent of control of DirectSat by DirecTV/AT&T.[14]

Simon responded via email the same day.[15] He said: "We have already provided you with all relevant information regarding this request. We see no reason to supplement our response."

The Union filed the original unfair labor practice charge in this case on May 20. Then on May 22, Simon sent a letter[16] to Webster to "further explicate DirectSat's rational (sic) for declining to provide a complete copy of the HSP Agreement. . . ." Simon stated in relevant part:

> The request for the full copy of the HSP agreement to evaluate DirecTV's control over DirectSat is irrelevant to negotiations between DirectSat and Local 21 regarding terms and conditions of employment of DirectSat employees. The "extent of control" of DirecTV over DirectSat has no bearing on negotiations over wages, hours, or other terms and conditions of employment which are exclusively controlled by DirectSat. As previously explained

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metrics are determined and by whom." On April 6, Simon responded with a different, redacted portion of the HSP agreement. (Stipulation of facts, par. 28; Jt. Exh. 19.) This portion listed the categories of performance standards DirecTV set for the Respondent, as well as the definition of each category. The General Counsel does not allege or argue that the Respondent's conduct as to this Union request for information was unlawful.

[13] Stipulation of facts, par. 27; Jt. Exh. 18.

[14] The General Counsel's complaint only alleges and relies upon the Union's requests for the full HSP agreement dated March 16 and May 19. It does not include the Union's requests dated November 23, 2015, February 16, and April 5.

[15] Stipulation of facts, par. 30; Jt. Exh. 21.

[16] Stipulation of facts, par. 31; Jt. Exh. 22.

to you at the table, DirecTV does not, and has no control over the wages paid to DirectSat employees or the metrics used to evaluate the performance of unit employees. These decisions are vested exclusively in DirectSat. For the last 2+ years since Local 21 was certified as the representative of employees of DirectSat's Chicago South (now South Holland location), DirectSat has bargained in good faith over the wages, hours and other terms and conditions of employment of unit employees. DirecTV has no role in these negotiations. DirectSat has never asserted that it cannot agree to a proposal on any issue because DirecTV might disapprove. Nor is the ability of DirectSat to enter into a collective bargaining agreement with Local 21 subject to approval by DirecTV.

DirectSat has provided Local 21 with those portions of its contract with DirecTV which may have some relevance to our negotiations - the scope of work covered by the HSP agreement and the metrics used by DirecTV to evaluate the performance of DirectSat under the HSP agreement. (DirectSat did not object to providing this information on the basis that while DirectSat has full authority to set performance metrics for unit technicians, DirectSat has stated that the metrics established by DirecTV to evaluate DirectSat help inform DirectSat in establishing performance metrics for technicians.)

For all the foregoing reasons, the Union's request for the full HSP contract is not relevant to any issue in negotiations and DirectSat declines to provide it.

ANALYSIS

The General Counsel's complaint alleges that the Respondent violated Section 8(a)(5) by refusing to provide the Union with a full, unredacted copy of its HSP Agreement with DirecTV. The only issue in dispute is the relevance of the agreement to the Union's duties as the bargaining representative of the Respondent's technicians.[17]

[17] In its answer to the complaint, the Respondent asserted a 10(b) defense. It makes no argument in this regard in its brief. In any event, the facts do not support this defense. The Union's first request for the HSP agreement occurred on November 23, 2015. The Respondent provided its partial response on December 4, 2015. The Union again requested the full agreement on February 16. The Respondent's first refusal to provide the full agreement occurred on February 20. Thus, the 10(b) period began to run as of February 20, when the Respondent clearly and unequivocally denied the Union's request for the full agreement. *Quality Building Contractors, Inc.*, 342 NLRB 429, 431 (2004). The Union filed its initial unfair labor practice charge on May 20 and it was served on the Respondent on that same date. (Stipulation of facts, par.1.) Thus, the charge filing occurred well within the required 6-month period from when the alleged unfair labor practice occurred.

I. LEGAL STANDARD

An employer has a statutory obligation to provide to a union that represents its employees, on request, information that is relevant and necessary to the union's performance of its duties as the exclusive collective-bargaining representative. *Piggly Wiggly Midwest, LLC*, 357 NLRB 2344, 2355 (2012); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956). When the union's request deals with information pertaining to employees in the unit that goes to the core of the employer-employee relationship, the information is "presumptively relevant." *National Broadcasting Co., Inc.*, 318 NLRB 1166, 1169 (1995), citing to *Shell Development Co. v. NLRB*, 441 F.2d 880 (9th Cir. 1971). However, an employer's contracts with customers are not presumptively relevant. *F.A. Bartlett Tree Expert Co., Inc.*, 316 NRLB 1312, 1313 (1995). Thus, the Union here must establish the relevance of the information. *Sheraton Hartford Hotel*, 289 NLRB 463, 463–464 (1988). To demonstrate relevancy, a liberal, discovery-type standard applies and the union's initial showing is not a burdensome or overwhelming one. *NLRB v. Acme Industrial Co.*, 385 U.S. at 437; *The New York Times Co.*, 270 NLRB 1267, 1275 (1984). Nonetheless, where the request is for information with respect to matters outside the unit, the standard is somewhat narrower and relevance is required to be somewhat more precise. *Island Creek Coal Co.*, 292 NLRB 480, 487 (1989), citing to *Ohio Power Co.*, 216 NLRB 987, 991 (1975).

II. DID THE UNION HAVE AN OBJECTIVE, FACTUAL BASIS TO SUSPECT THE RESPONDENT AND DIRECTV WERE JOINT EMPLOYERS?

To demonstrate relevance, the General Counsel first argues that the Union needed to determine if DirecTV and the Respondent were joint employers for purposes of collective bargaining.[18] Information concerning the existence of a joint employer relationship also is not presumptively relevant and a union has the burden of demonstrating its relevancy. *Connecticut Yankee Atomic Power Co.*, 317 NLRB 1266, 1267 (1995); *Knappton Maritime Corp.*, 292 NLRB 236, 239 (1988). A union cannot meet its burden based on a mere suspicion that a joint employer relationship exists. It must have an objective, factual basis for so believing. *Kranz Heating & Cooling*, 328 NLRB 401, 402–403 (1999). However, a union is not obligated to disclose those facts to the employer at the time of the information request. *Baldwin Shop 'N Save*, 314 NLRB 114, 121 (1994). It is sufficient if the General Counsel demonstrates at the hearing that the union had, at the relevant time, a reasonable belief.[19] *Cannelton Industries, Inc.*, 339 NLRB 996, 997 (2003).

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[18] In *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015), the Board instituted a revised standard for determining joint employer status. Under that standard, two or more entities are joint employers if they share or codetermine those matters governing the essential terms and conditions of employment. Possessing authority over those terms is sufficient to establish joint employer status. Such terms include the direction of the work force, dictating the number of workers to be supplied, and determining the manner and method of work performance.

[19] Of course, in this case, no hearing occurred. Accordingly, the objective facts relied upon by the Union either must have been disclosed at the time of the requests or included in the stipulation of facts.

Both *Connecticut Yankee Atomic Power* and *Kranz Heating & Cooling*, supra, involved situations where unions demonstrated a reasonable belief that two entities were joint employers. In *Connecticut Yankee*, the union investigated the working conditions of subcontracted employees at a plant where it represented permanent employees. The union obtained facts indicating the employer with whom it had the collective-bargaining relationship played a role in the hiring, work scheduling, and supervision of the subcontracted employees. In addition, a union representative became aware of prior Board cases where similar claims of joint employer status were made. In *Kranz Heating*, the union discovered a variety of objective facts suggesting joint employer status. The union there represented employees in a business that allegedly closed. Following the closure, the union determined that a newly formed company was operating the same or similar business from the same location. The new company also was using the same equipment and telephone number. In these cases, the unions formed a reasonable belief of joint employer status based upon their collection of objective facts, before making their information requests. See also *Piggly Wiggly Midwest*, 357 NLRB at 2357–2358; *Knappton Maritime Corp.*, 292 NLRB at 239; *Cannelton Industries, Inc.*, 339 NLRB at 997.

In contrast in this case, the stipulated facts do not establish the Union had an objective basis for believing the Respondent and DirecTV were joint employers, at the time it made the information requests. Prior to its March 16th request, the Union only knew that DirecTV and the Respondent had a contractual relationship, under which the Respondent provided installation and maintenance services to DirecTV. The mere existence of a service contract between two companies is not a sufficient basis to reasonably believe they might be joint employers. If it were, then every agreement between an employer and a subcontractor would be deemed relevant to the question of joint employer status, based upon nothing more than the contract's existence. The Union also knew that both DirecTV and the Respondent installed and serviced DirecTV equipment. But the fact that both companies performed the work, standing alone, is not an objective basis for concluding DirecTV possessed control over how the Respondent did so. When the Union made its May 19th request, the only new information it had obtained were DirecTV's performance standards for DirectSat contained in the HSP agreement. However, nothing therein suggested DirecTV had any control over how the Respondent went about meeting those standards. Finally, the stipulated record contains no additional, contemporaneous facts relied upon by the Union for believing a joint employer relationship existed. Taken together, these minimal facts fall into the category of mere suspicion. The Union needed more here.[20]

[20] Although Webster also stated the Union needed the HSP agreement "for use in bargaining" and "in connection with DirectSat negotiations," such statements are too general and conclusory to establish relevance. *F.A. Bartlett Tree Expert Co.*, 316 NLRB at 1313; *Island Creek Coal Co.*, 292 NLRB at 490 fn. 19.

III. DID THE UNION NEED THE REQUESTED INFORMATION TO VERIFY CLAIMS MADE BY THE RESPONDENT?

The General Counsel also contends the Union was entitled to the full HSP agreement to verify the accuracy of claims made by the Respondent concerning the relationship between the two entities. Relevance can be established in this fashion. *Caldwell Manufacturing Co.*, 346 NLRB 1159, 1160 (2006) (relevance established where employer made specific factual assertions in bargaining concerning need to improve competitiveness and, thereafter, union requested cost and productivity information in part to evaluate the accuracy of the claims); *Shoppers Food Warehouse Corp.*, 315 NLRB 258, 259 (1994) (union was not required to accept at face value an employer's assertion that two entities were separate operations). The U.S. Supreme Court itself stated in *Truitt Mfg. Co.* that if "an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy." 351 U.S. at 152–153.

In this case, the stipulated facts likewise fail to establish that the Respondent claimed it and DirecTV were not joint employers. Prior to the Union's information requests, the only conceivable assertions Simon made in this regard were in his February 20 letter. Simon said there was no "shared work" between the companies. He also stated repeatedly that DirecTV had the exclusive right to contract out all or none of its work to the Respondent. In evaluating joint employer status, the Board looks to whether the employers share control over terms and conditions of employment, not whether they share work. *Browning-Ferris*, supra. Those terms and conditions include determining the manner and method of employees' work performance, not the amount of work one employer subcontracts to another. The General Counsel has overstated the significance of Simon's statements. See *F.A. Bartlett Tree Expert Co.*, 316 NLRB at 1313. The closest Simon came to putting joint employer status at issue was in his May 22 letter to the Union, after the Union filed its unfair labor practice charge. Therein, Simon stated DirecTV had no control over the wages paid to DirectSat employees or the metrics used to evaluate the performance of unit employees. Simon also stated that DirecTV had no role in the negotiations and could not require that the Respondent seek its approval to enter into a collective bargaining agreement. However, these statements all came after the Union submitted its information requests for the full HSP agreement. Thus, those requests could not test the accuracy of claims that had not yet been made. In sum, the Respondent never denied that it and DirecTV were joint employers. It also did not deny any of the specific factors used to evaluate joint employer status. Therefore, the Union cannot establish the relevance of the full, unredacted HSP agreement on this basis either.

However, the Union is entitled to verify the Respondent's repeated claim that it furnished all the relevant portions of the HSP agreement on the scope-of-unit-work issue. First, no question exists, and the Respondent concedes, that information in the HSP agreement on the scope of unit work is relevant to the Union's representational functions.[21] This conclusion is supported by the stipulated facts. The dispute over the HSP agreement only arose because the

[21] R.. Br., p. 10, fn. 5.

Respondent itself included a reference to the agreement in its November 23, 2015 scope-of-unit-work bargaining proposal. The Respondent thereby put into play what services it furnished to DirecTV pursuant to the agreement. The Company was seeking in bargaining to classify any work performed outside of the agreement as nonbargaining unit work. The Union certainly is entitled to know the universe of bargaining unit work as defined in the agreement, in evaluating the Respondent's proposal. Moreover, the Respondent repeatedly told the Union it had provided all relevant parts of the HSP agreement in this regard. In its initial, three-page response dated December 4, 2015, the Respondent provided only a portion of the agreement it alone deemed "relevant to scope of work." Thereafter, on March 16, the Union asked for a full copy of the HSP agreement and reiterated that the Respondent referenced the agreement in its new product lines proposal. At the bargaining session on March 22, Simon again stated the Company already had provided all the relevant portions of the agreement. The Union then resubmitted its request for the full agreement on both April 5 and May 19.

Thus, the question presented is whether the Respondent unilaterally could decide what portions of the HSP agreement were relevant, only turn over those portions, and then refuse to provide the remainder of the agreement when the Union requested it. Board precedent is clear that the Respondent was not entitled to do so. In this regard, the factual situation here is similar to that in *Piggly Wiggly*, supra. In that case, a union requested sales and franchise agreements from an employer, whom it suspected had an alter-ego relationship with certain franchisees. The employer argued, in part, that the requested information was unnecessary, because its attorney had provided one paragraph of an agreement to the union and later told the union that the documents requested contained no other relevant information. The judge rejected the employer's argument that the response was sufficient and it did not have to provide the full agreements. The judge stated: "The [u]nion is not required to take the [employer's] word for it, but has the right to assess and verify for itself the accuracy of the [employer's] claims in bargaining." The Board adopted the judge's conclusion that the employer violated the Act, by delaying in providing the agreements. See also *Knappton Maritime Corp.*, 292 NLRB at 239–240 (providing an excised copy of a sales agreement, but not the full, original copy, violated the Act); *Southern Ohio Coal Co.*, 315 NLRB 836, 844–845 (1994) (an employer telling a union its version of what was in, and not in, a sales agreement did not satisfy the union's right to have access to an unexcised copy of that agreement).

Furthermore, the Union's inability to identify other specific relevant information in the HSP agreement cannot be held against it, since it has never seen the agreement. *Olean General Hospital*, 363 NLRB No. 62, slip op. at 7 (2015). In *Olean General*, a union requested a copy of a patient care survey conducted by a third party. Staffing had been an issue in contract negotiations. The Union wanted to determine if staffing was addressed in the report, even though it had no knowledge the survey contained such information. The Board rejected the employer's claim that the union failed to demonstrate a specific need for the patient care survey. The Board noted that, since the employer had seen the report and knew what was in it, the employer had ample opportunity to show that the information in it would be of no benefit to the union. The same principle applies in this case. Although it did provide a partial response

to the Union, the Respondent never made an attempt to show the Union that the remainder of the HSP agreement lacked information relevant to the scope of unit work.

Finally, the Respondent contends the Union never objected to its providing only three pages of the HSP agreement. It is true that the Union never stated the partial response was inadequate. It also did not provide much in the way of an explanation as to why it needed the full HSP agreement. Nonetheless, what the Union did do was submit a request for the full agreement, on three occasions, after receiving the Company's initial response. The Union's conclusion that the initial response was not sufficient obviously can be inferred from its subsequent requests for the full agreement.

For all these reasons, I conclude that relevance is established here, because the Union is entitled to verify the Respondent's claim that it has provided all portions of the HSP agreement relevant to the scope of unit work. By failing to provide the full, unredacted HSP agreement, the Respondent violated Section 8(a)(5).[22]

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide the Union with information it requested on March 18 and May 19, 2016,

[22] The General Counsel did not advance the legal theory upon which I am finding a violation. Nonetheless, under the circumstances of this case, I find it appropriate to exercise my discretion in this manner. See, e.g., *Local 58, International Brotherhood of Electrical Workers (Paramount Industries, Inc.)*, 365 NLRB No. 30, slip op. at 4 fn. 17 (2017) (where the violation was alleged in the complaint, the factual basis for the violation was clear from the record, the law was well established, and no due process concerns were implicated, the Board found a violation on a different legal theory than that pursued by the General Counsel); *Riverside Produce Co.*, 242 NLRB 615, 615 fn. 2 (1979) (where the allegations were generally encompassed in the complaint, the issues were fully litigated, and the record fully supported the conclusions, the Board approved of a judge's finding of violations not specifically alleged in the complaint). Because this case was submitted pursuant to a stipulated record, no factual disputes exist. The complaint contained an allegation of unlawful conduct by the Respondent, specifically its refusal to provide the Union with a full copy of the HSP agreement. The parties similarly agreed that the issue in this case was "Whether the Respondent has violated Section 8(a)(5) of the Act by failing and refusing to provide the Union with a full unredacted copy of the [HSP agreement] between DirecTV and DirectSat." (Stipulation of facts, p. 2.) The complaint allegation and statement of the issue are sufficiently broad to encompass this legal theory. As a result, the Respondent has not been denied due process. Indeed, the Respondent addressed this theory in its brief. It repeatedly argued that the Union did not object to its initial response. In doing so, the Respondent advanced the contention that its initial response was adequate under the law. Finally, the stipulated facts fully support finding a violation on this basis.

specifically a full, unredacted copy of the Home Service Provider agreement between the Respondent and DirecTV. The HSP agreement is necessary and relevant to the Union's performance of its duties as the collective-bargaining representative of unit employees.[23]

4. The above unfair labor practice affects commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, the Respondent must cease and desist from refusing to provide the Union with requested information that is necessary and relevant to the performance of its duties as the exclusive collective-bargaining representative of the Respondent's installation and service technicians. The Respondent also must provide the Union with a full, unredacted copy of the HSP agreement.

---

[23] After the parties submitted their briefs, the Respondent filed a motion to strike portions of the Union's brief, because they were not a part of the stipulated record. The first section at issue is entitled: "The Possible Joint Employer Status of DirectSat and DirecTV." In this section, the Union contends that, during the time period when it requested the full HSP agreement, it became aware that the issue of whether the Respondent and DirecTV were joint employers was being litigated in a Fair Labor Standards Act case in Federal court. However, this fact is not in the stipulated record. Thus, I agree with the Respondent that, in this regard, the Union is inappropriately seeking to introduce new facts that are not properly before me for consideration. The Union also attached a decision of the Fourth Circuit Court of Appeals from January 2017, well after the material dates in this case, concerning the joint employer status of the two companies. The Union requested that I take judicial notice of the decision, as well as the Union's reliance on the decision as part of the reason for its information request. Of course, a judge can take judicial notice of an appellate court's decision on a material legal issue. But the Union's claimed reliance on this decision is a factual, not a legal, matter. Any such reliance to substantiate its information request had to be presented either at the time the request was made or in the stipulated factual record. Neither occurred. Thus, I grant the Respondent's motion to strike this portion of the Union's brief and have not considered that section in reaching this conclusion of law.

The second brief section at issue is entitled: "How A Technician's Earnings Are Determined." Therein, the Union addresses the concurrent information requests it submitted to the Respondent concerning DirecTV's performance standards, as well as the technicians' scorecards and performance metrics. Contrary to the Respondent's contention, the stipulated record does contain facts regarding the performance standards information requests. (Stipulation of facts, par. 28; Jt. Exh. 19.) Thus, I deny the Respondent's motion to strike this section. Nonetheless, as previously discussed, the General Counsel's complaint in this case alleges only the Respondent's failure to provide the full HSP agreement, not any information concerning performance standards. The General Counsel's brief contains no argument concerning performance standards, including their relation, if any, to the requests for the full HSP agreement. That issue simply is not before me. Accordingly, I find the Union's performance standards argument has no bearing on the complaint allegation here and I do not rely upon that section of the Union's brief in reaching this conclusion of law.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[24]

ORDER

The Respondent, DirectSat USA, LLC, South Holland, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively with the International Brotherhood of Electrical Workers, Local Union 21, AFL–CIO, by failing to provide information requested by the Union that is necessary and relevant for the Union's performance of its duties as the collective-bargaining representative of the employees in the Unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days, provide the Union with a full, unredacted copy of the Home Service Provider agreement between the Respondent and DirecTV.

(b) Within 14 days after service by the Region, post at its facility in South Holland, Illinois, copies of the attached notice marked "Appendix."[25] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 days in conspicuous places including all places were notices to employees are customarily posted. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by

[24] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[25] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 18, 2016.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C., July 20, 2017.

Charles J. Muhl
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain in good faith with the International Brotherhood of Electrical Workers, Local Union 21, AFL-CIO (the Union), by failing to provide the Union with information that is necessary and relevant to the performance of its duties as the exclusive collective-bargaining representative of employees in the following, appropriate bargaining unit:

All full-time and regular part-time Installation/Service Technicians employed by the Employer at its facility located in South Holland, Illinois, but excluding all other employees, confidential employees, guards, and supervisors as defined in the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of this order, provide the Union with a full, unredacted copy of the Home Service Provider agreement between us and DirecTV. The Union requested this information on March 18 and May 19, 2016 and the information is relevant to the Union's duties as your collective-bargaining representative.

DIRECTSAT USA, LLC
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Dirksen Federal Building, 219 S. Dearborn Street, Suite 808, Chicago, IL 60604–5208
(312) 353–7570, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/13-CA-176621 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (312) 353–7170.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIRECTSAT USA, LLC and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 21, AFL–CIO	Case 13-CA-176621

ORDER TRANSFERRING PROCEEDING TO THE NATIONAL LABOR RELATIONS BOARD

A hearing in the above-entitled proceeding having been held before a duly designated Administrative Law Judge and the Decision of the said Administrative Law Judge, a copy of which is annexed hereto, having been filed with the Board in Washington, D.C.,

IT IS ORDERED, pursuant to Section 102.45 of the National Labor Relations Board's Rules and Regulations, that the above-entitled matter be transferred to and continued before the Board.

Dated, Washington, D.C., July 20, 2017**.**

By direction of the Board:

Gary Shinners

Executive Secretary

NOTE: Communications concerning compliance with the Decision of the Administrative Law Judge should be with the Director of the Regional Office issuing the complaint.

Attention is specifically directed to the excerpts from the Board's Rules and Regulations and on size of paper, and that requests for extension of time must be served in accordance appearing on the pages attached hereto. **Note particularly the limitations on length of briefs with the requirements of the Board's Rules and Regulations Section 102.114(a) & (i).**

Exceptions to the Decision of the Administrative Law Judge in this proceeding must be received by the Board's Office of the Executive Secretary, 1015 Half Street SE, Washington, DC 20570, on or before **August 17, 2017.**

jackson lewis.

Jackson Lewis P.C.
666 Third Avenue
New York, New York 10017
Tel 212 545-4000
Fax 212 972-3213
www.jacksonlewis.com

MY DIRECT DIAL IS: (212) 545-4020
MY EMAIL ADDRESS IS: DOUGLAS.KLEIN@JACKSONLEWIS.COM

August 4, 2017

VIA E-FILE
Office of the Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

Re: DirectSat USA, LLC
Case No.: 13-CA-176621

Dear Sir or Madam:

We represent Respondent DirectSat USA, LLC in this case. We write to request that Respondent's time to file exceptions to the Decision of the Administrative Law Judge, dated July 20, 2017, be extended from August 17, 2017 until August 31, 2017. We appreciate your attention to this request.

Very truly yours,

JACKSON LEWIS P.C.

Douglas J. Klein

cc: Gilbert A. Cornfield, Esq. (via e-mail)
Elizabeth Cortez, Esq. (via e-mail)

United States Government

OFFICE OF THE EXECUTIVE SECRETARY
NATIONAL LABOR RELATIONS BOARD
1015 HALF STREET SE
WASHINGTON, DC 20570

August 9, 2017

Re: DirectSat USA, LLC
Case 13-CA-176621

EXTENSION OF TIME TO FILE EXCEPTIONS AND BRIEF IN SUPPORT OF EXCEPTIONS

The request for an extension of time in the above-referenced case is granted. The due date for the receipt in Washington, D.C. of Exceptions to the Administrative Law Judge's Decision and Brief in Support of Exceptions is extended to **August 31, 2017.** This extension of time to file exceptions and brief in support of exceptions applies to all parties.

/s/ Roxanne L. Rothschild
Deputy Executive Secretary

cc: Parties
Region

Representing Management Exclusively in Workplace Law and Related Litigation

jackson lewis.

Jackson Lewis P.C.
666 Third Avenue
New York, New York 10017
Tel 212 545-4000
Fax 212 972-3213
www.jacksonlewis.com

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BALTIMORE, MD	INDIANAPOLIS, IN	NORFOLK, VA	SALT LAKE CITY, UT
BIRMINGHAM, AL	JACKSONVILLE, FL	OMAHA, NE	SAN DIEGO, CA
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DAYTON, OH	MEMPHIS, TN	PORTLAND, OR	WASHINGTON, DC REGION
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DETROIT, MI	MILWAUKEE, WI	PROVIDENCE, RI	
GRAND RAPIDS, MI	MINNEAPOLIS, MN		

*through an affiliation with Jackson Lewis P.C., a Law Corporation

MY DIRECT DIAL IS: (212) 545-4020
MY EMAIL ADDRESS IS: DOUGLAS.KLEIN@JACKSONLEWIS.COM

August 25, 2017

VIA E-FILE
Office of the Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

Re: DirectSat USA, LLC
Case No.: 13-CA-176621

Dear Sir or Madam:

We represent Respondent DirectSat USA, LLC in this case. We write to request that Respondent's time to file exceptions to the Decision of the Administrative Law Judge, dated July 20, 2017, be further extended from August 31, 2017 until September 14, 2017. Respondent does not anticipate requesting any further extension. Counsel for the General Counsel and Counsel for Charging Party consent to this request.

We appreciate your attention to this request.

Very truly yours,

JACKSON LEWIS P.C.

Douglas J. Klein

cc: Gilbert A. Cornfield, Esq. (via e-mail)
Elizabeth Cortez, Esq. (via e-mail)

United States Government

OFFICE OF THE EXECUTIVE SECRETARY
NATIONAL LABOR RELATIONS BOARD
1015 HALF STREET SE
WASHINGTON, DC 20570

August 28, 2017

Re: DirectSat USA, LLC
Case 13-CA-176621

EXTENSION OF TIME TO FILE EXCEPTIONS AND BRIEF IN SUPPORT OF EXCEPTIONS

The request for an extension of time in the above-referenced case is granted. The due date for the receipt in Washington, D.C. of Exceptions to the Administrative Law Judge's Decision and Brief in Support of Exceptions is extended to **September 14, 2017**. This extension of time to file exceptions and brief in support of exceptions applies to all parties.

/s/ Roxanne L. Rothschild
Deputy Executive Secretary

cc: Parties
Region

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIRECTSAT USA, LLC Respondent, -and- INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 21, AFL-CIO, Union.	Case No. 13-CA-176621

RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Respondent DirectSat USA, LLC ("DirectSat" or "Respondent"), by its attorneys, Jackson Lewis P.C., pursuant to § 102.46 of the National Labor Relations Board's ("NLRB") Rules and Regulations, takes exception to the following findings, conclusions, and recommendations of the Administrative Law Judge Charles J. Muhl ("ALJ"):

1. The finding/conclusion that the question presented is whether the Respondent unilaterally could decide what portions of the Home Service Provider agreement ("HSP Agreement") with DirecTV Inc. ("HSP Agreement") were relevant. (D. 10:15-17)

2. The reliance on Piggly Wiggly Midwest, LLC, 357 NLRB 2344 (2012) in support of the ALJ's findings/conclusions. (D. 10:15-28).

3. The reliance on Knappton Maritime Corp., 292 NLRB 236 (1988) in support of the ALJ's findings/conclusions. (D. 10:28-30).

4. The reliance on Southern Oil Coal Co., 315 NLRB 835 (1994) in support of the ALJ's findings/conclusions. (D. 10:30-32).

5. The reliance on Olean General Hospital, 363 NLRB No. 62 (2015) in support of the ALJ's findings/conclusions. (D. 10:34-43; 11:1-2).

6. The finding/conclusion that the Union's conclusion that Respondent's initial response was not sufficient can be inferred from the Union's subsequent requests for the full HSP Agreement. (D. 11:4-10).

7. The finding/conclusion that relevance is established on the stipulated record because the Union is entitled to verify the Respondent's claim that it has provided all portions of the HSP Agreement relevant to the scope of unit work. (D. 11:12-14).

8. The finding/conclusion that it was appropriate for the ALJ to find a violation of the Act based on a legal theory not advanced by the General Counsel. (11:15 n.22).

9. The finding/conclusion that Respondent violated Section 8(a)(5) of the Act by failing to provide the full, unredacted HSP Agreement. (D. 11:14-15).

10. The ALJ's finding/conclusion denying Respondent's motion to strike the section of the Union's Brief to the ALJ entitled "How A Technicians Earnings Are Determined." (D. 12:4 n. 23).

11. The recommended remedy for Respondent to cease and desist from refusing to provide the Union with requested information that is necessary and relevant to the performance of it duties as the exclusive collective-bargaining representative of the Respondent's installation and service technicians. (D. 12:9-16).

12. The recommended remedy of providing the Union with a full, unredacted copy of the HSP Agreement. (D. 12:16-17).

13. The recommended remedy of posting the notice contained in the Appendix to the ALJ's Decision. (D. 25:11-30).

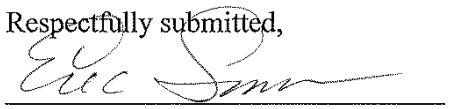
14. Respondent generally excepts to the Conclusions of Law (D. 11:17-24, 12:1-7).

15. Respondent generally excepts to the Remedy. (D. 12: 9-17, 13:1-2).

16. Respondent generally excepts to the Order. (D. 12:4-36; 13:1-9).

17. To the extent that Respondent's Brief in Support of its Exceptions references any of the ALJ's findings/conclusions not excepted to above, Respondent excepts to those findings/conclusions.

Respectfully submitted,

By 

Eric P. Simon
Douglas J. Klein
JACKSON LEWIS P.C.
666 Third Avenue
29th Floor
New York, NY 10017
(212) 545-4000
Counsel for Respondent

CERTIFICATE OF SERVICE

The undersigned affirms that on September 14, 2017, Respondent's Exceptions to Administrative Law Judge Charles Muhl's Decision were filed with the National Labor Relations Board using the e-filing system at www.nlrb.gov, and that copies were served on the following individuals by electronic mail:

Elizabeth Cortez, Esq. Counsel for the General Counsel National Labor Relations Board, Region 13 219 S. Dearborn St., Suite 808 Chicago, IL 60604 Elizabeth.Cortez@nlrb.gov
Gilbert A. Cornfield, Esq. Cornfield and Feldman LLP 25 East Washington Street, Suite 1400 Chicago, IL 60602-1708 GCornfield@cornfieldandfeldman.com

JACKSON LEWIS P.C.

Attorneys for Respondent

Dated: September 14, 2017

By: _____

Douglas J. Klein
JACKSON LEWIS P.C.
666 Third Avenue, 29th Floor
New York, New York 10017
(212) 545-4020

Confirmation Number	1000164770
Date Submitted	9/21/2017 10:17:09 AM (UTC-05:00) Eastern Time (US & Canada)
Case Name	DirectSat USA, LLC
Case Number	13-CA-176621
Filing Party	Counsel for GC / Region
Name	Cortez, Elizabeth S
Email	elizabeth.cortez@nlrb.gov
Address	219 S. Dearborn St. Suite 808 Chicago, IL 60604
Telephone	(312) 353-4174
Fax	(312) 886-1341
Original Due Date	9/28/2017
Date Requested	10/19/2017
Reason for Extension of Time	Counsel for the General Counsel has competing legal assignments which make it difficult to file an Answering brief within the next few weeks. The Parties have been contacted and do not oppose this request.
What Document is Due	Answering Brief to Exceptions
Parties Served	Eric P. Simon Douglas J. Klein JACKSON LEWIS P.C. 666 Third Ave., 29th Floor New York, NY 10017 SimonE@JacksonLewis.com Douglas.Klein@jacksonlewis.com Gilbert A. Cornfield Cornfield and Feldman LLP 25 East Washington Street, Suite 1400 Chicago, IL 60602-1708 GCornfield@cornfieldandfeldman.com

United States Government

OFFICE OF THE EXECUTIVE SECRETARY
NATIONAL LABOR RELATIONS BOARD
1015 HALF STREET SE
WASHINGTON, DC 20570

September 22, 2017

Re: DirectSat USA, LLC
Case 13-CA-176621

EXTENSION OF TIME TO FILE ANSWERING BRIEF

The request for an extension of time in the above-referenced case is granted. The due date for the receipt in Washington, D.C. of Answering Brief to Exceptions to the Administrative Law Judge's decision is extended to **October 19, 2017**. This extension of time for filing answering briefs applies to all parties.[1]

/s/ Farah Z. Qureshi
Associate Executive Secretary

cc: Parties
Region

[1] Please note that when a party is granted an extension of time to file an answering brief to exceptions to an Administrative Law Judge's decision, this extension does not automatically extend the time for filing cross-exceptions to that decision. As no request was made for extending the time for filing cross-exceptions, the due date for filing cross-exceptions remains September 28, 2017.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

DIRECTSAT USA, LLC

Case 13-CA-176621

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 21, AFL-CIO

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN ANSWER TO RESPONDENT'S EXCEPTIONS

I. INTRODUCTION

In the instant case, Administrative Law Judge Charles J. Muhl properly concluded in his decision, dated July 20, 2017, that DirectSat USA, LLC violated Section 8(a)(5) of the Act by unlawfully refusing to provide requested information to Local Union 21 of the International Brotherhood of Electrical Workers, AFL–CIO (the Union) during negotiations for an initial contract.[1] The ALJ specifically found that the Union was entitled to a full and unredacted copy of the Respondent's contract—the "Home Service Provider" agreement—with DirecTV. The ALJ properly pointed out that the dispute over the production of the HSP agreement only arose because the Respondent itself included a reference to the agreement in its November 23, 2015 scope-of-unit-work bargaining proposal that sought to classify any work performed outside of the agreement as non-bargaining unit work. ALJD p. 10, line 3; Jt. M. par. 20; Jt. Ex. 11. The Respondent therefore "put into play" what services it furnished to DirecTV pursuant to the

[1] The National Labor Relations Act will hereinafter be referred to as the "Act"; the National Labor Relations Board hereinafter is the "Board"; the Administrative Law Judge hereinafter is the "ALJ"; DirectSat hereinafter is the "Respondent". Citations to the ALJ's decision are hereinafter referred to as "ALJD__"; Joint Motion for Stipulated Record is hereinafter referred to as Jt. M.; Joint Exhibits are hereinafter referred to as "Jt. Ex.__"; Respondent's Brief is hereinafter referred to as "R. Br. __"; and Respondent's Brief in support of its exceptions is hereinafter referred to as "R. Br. Ex. __".

agreement. ALJD p. 10, line 2. In fact, as the ALJ noted, the Union was certainly entitled to know the universe of bargaining unit work as defined in the agreement, in evaluating the Respondent's proposal. ALJD p. 9 to 10. But Respondent repeatedly refused to provide a full copy of the agreement and took the position it had provided all the relevant portions of the agreement. ALJD p. 10, lines 6 to 7. Contrary to Respondent's mistaken assertion, the ALJ properly concluded that "the Union [was] entitled to verify the Respondent's repeated claim that it furnished all the relevant portions of the HSP agreement on the scope-of-unit-work issue." ALJD p. 9, lines 38 to 39. In addition, Respondent's claim that they were denied due process by the ALJ finding a violation of the Act based on a theory that was not advanced by the General Counsel is unfounded. R. Br. Ex. p. 2. The record clearly establishes that: (1) the violation was alleged in the Complaint; (2) the factual basis for the violation was clear from the record; (3) the law was well established; and (4) the issue was fully litigated at the hearing. Indeed, the ALJ correctly found that his theory was fully addressed in Respondent's brief. ALJD, p. 11, ft. 22.

Based on the fact that the evidence clearly establishes that Respondent violated Section 8(a)(5) of the Act, the General Counsel respectfully requests that Respondent's Exceptions be rejected in their entirety.

II. THE ALJ PROPERLY CONCLUDED THAT RESPONDENT VIOLATED SECTION 8(a)(5) OF THE ACT BY UNLAWFULLY REFUSING TO PROVIDE A FULL AND UNREDACTED COPY OF THE RESPONDENT'S CONTRACT—THE "HOME SERVICE PROVIDER" AGREEMENT—WITH DIRECTV AS REQUESTED.

Contrary to Respondent's Exceptions 1 and 7, the ALJ properly concluded that the HSP agreement is necessary and relevant to the Union's performance of its duties as the collective-bargaining representative of unit employees. ALJD p. 9; R. Br., p. 10, fn. 5. In reaching this

conclusion, the ALJ found that, on November 4, 2015, it was the Respondent who presented the Union with Proposal No. 78, which sought to classify any work performed outside of the HSP agreement as non-bargaining unit work. Jt. M. pp.4; Jt. Ex. 11.

The Union then repeatedly asked for the HSP agreement, specifically referring to Respondent's introduction of the agreement in Proposal No. 78. On November 23, the Union therefore made an information request to Respondent indicating, "one of the company proposals references the HSP agreement with DTV. We'd like a copy of the agreement referenced in the proposal." .Jt. Mt. pp. 4-5; Jt. Ex. 12. On December 4, Respondent did not provide the requested information but only provided a heavily redacted copy of only three pages of the HSP Agreement. Jt. Ex. 13. On February 16, 2016, the Union reiterated its request for the HSP agreement and explained its use in bargaining. Jt. Mt. pp. 5; Ex. 14. But on February 20, 2016, Respondent once again refused to provide the requested information. Jt. M. pp. 6; Jt. Ex. 16. In fact, at a bargaining session on March 22, 2016, Respondent acknowledged the Union's request for a full copy of the HSP Agreement, but yet again refused to provide the agreement. Jt. M. pp. 6; Jt. Ex. 17. Thereafter, on about April 5, 2016, the Union renewed its request for a full copy of the HSP agreement and, on April 6, Respondent refused to provide it. Respondent instead simply provided the same heavily redacted copy of the HSP Agreement as well as a redacted copy of an amendment to the HSP Agreement. Jt. M. p. 6; Jt. Ex. 18 and 19. Finally, on May 19, the Union renewed its request for a "FULL" copy of the HSP Agreement for a fourth time, but Respondent again refused to comply. (Jt. M. pp. 6-7; Jt. Ex. 20 -23;)

The ALJ properly held that Respondent was not entitled to unilaterally decide what portions of the of the HSP agreement were relevant, only turn over those portions, and then refuse to provide the remainder of the agreement as requested by the Union. ALJD p. 10. In

Exceptions 2-5, Respondent takes exception to the ALJ's reliance on the following cases: *Piggly Wiggly Midwest, LLC*, 357 NLRB 2344 (2012), *Knappton Maritime Corp*., 292 NLRB 236 (1988), *Southern Ohio Coal Co*., 315 NLRB 836 (1994), and *Olean General Hospital*, 363 NLRB No. 62 (2015). However, the ALJ appropriately relied on these well-established cases to conclude that contrary to Respondent's assertion, they are not entitled to unilaterally decide what portions of the HSP agreement were relevant. As discussed below, in all of these cases the employers provided only portions of an agreement as in the present case.

First, in addressing the *Piggly Wiggly* case, the ALJ properly noted that the Board there adopted an administrative law judge's conclusion that an employer failed to timely provide a union with requested sales and franchise agreements. While the employer contended that it was not necessary to produce the agreements since its attorney had furnished one paragraph of an agreement to the union and also provided it with assurances that there was no other relevant information contained in the agreements, the judge held that the union had the right to verify for itself the accuracy of the employer's assertion.

Similarly, in the instant case, the Union should not be required to rely on the Respondent's representation that the remaining portions of the HSP agreement are not relevant. Although Respondent's Counsel Eric Simon assured the Union Respondent had provided relevant portions of the agreement at the bargaining session on March 22, 2016, the ALJ agreed that "the Union [was] entitled to verify the Respondent's repeated claim that it furnished all the relevant portions of the HSP agreement on the scope-of-unit-work issue." ALJD p. 9, lines 38 to 39. The ALJ likewise pointed out that Respondent never made an attempt to show the Union that the remainder of the HSP agreement lacked the information relevant to the scope of unit work. ALJD p. 11, lines 1-2.

Second, the ALJ also properly relied on the *Knappton Maritime Corp.* case, as the Board in that case held that the Union had established a reasonable basis for requesting a sales agreement and that the information in the agreement was relevant to the Union's determination of whether to file a grievance or take other action to assure the contractual rights of the employees. 292 NLRB at 239-240 (1988). The Board further held that to establish the relevancy of such information, the union must, as stated above, show that it had a reasonable belief that enough facts existed to give rise to a reasonable belief that one entity was the alter ego of another. As a result, the employer there violated Section 8(a)(5)of the Act by only providing an excised copy of the sales agreement. Applying these legal principles to the instant case, Respondent's reference to the HSP agreement with DirecTV in its November 23, 2015, proposal gave rise to a reasonable belief that the Union needed to see a copy of this agreement in its entirety so it could intelligently evaluate Respondent's proposal.

Third, the ALJ properly relied on the *Southern Ohio Coal Co.* case where the Board similarly held that sales information is considered relevant to a union's statutory duty in representing its member-employees and it is not the province of the employer to decide what information the Union needs to properly evaluate the merits of a grievance. 315 NLRB 836, 844–845 (1996). The employer there was found to have violated Section 8(a)(5) of the Act by refusing to provide the union with a unexcised copy of a sales agreement and instead simply telling the union what was allegedly in the agreement. As in that case, it is not Respondent's authority in the present case to determine whether the redacted and missing pages of the HSP agreement are necessary for the Union to engage in proper bargaining.

Finally, in addressing Respondent's assertion that the ALJ misapplied the *Olean General Hospital* case, the Respondent is simply mistaken. 363 NLRB No. 62, slip op. at 7 (2015). The

Board, in that case, held that a union's inability to identify specific relevant information in a requested patient survey report could hardly be held against the union when it had never seen the report. The Board further held that by contrast, the respondent there had seen the report and knew what was in it. Accordingly, it had ample opportunity to show that the information contained in the report would be of no benefit to the union, if that was in fact the case. Therefore, contrary to Respondent's position, the ALJ properly relied on the *Olean* case in the instant case to find that the Union's inability to identify specific relevant information in the HSP Agreement could likewise not be held against it. Like in the *Olean* case, the Respondent in this case cannot argue the Union failed to prove relevancy as it is clear what Respondent did provide was heavily redacted and consisted of only three pages. Similarly, the Respondent could have at a minimum shown the Union the full agreement and proven whether it would not have been of any benefit to the Union as it has argued. Accordingly, the ALJ properly relied on the above cases at issue as they all address the relevancy of agreements which are very similar to the HSP agreement at issue in this case.

In the same vein, in its Exception 6, Respondent erroneously takes exception to the ALJ's proper finding/conclusion that the Union' conclusion that Respondent's initial response was not sufficient can be inferred from the Union's subsequent requests for the full HSP agreement. R. Ex. p.2. Respondent is wrong as the evidence clearly shows the Union repeatedly asked for a full copy of the agreement between November 23, 2015, and May 19, 2016. In fact, in the March 18 request, the Union capitalized the word, "FULL". Jt. M. pp. 6; Jt. Ex 16. Respondent further acknowledges that on March 22, at a bargaining session, the Union again requests a full copy of the HSP agreement. Jt. M. pp. 6; Jt. Ex. 17. In its fourth request, on May 19, the Union again capitalized the word, "FULL" in its request for the HSP agreement. The evidence shows

that combined with several subsequent requests and the capitalization of the word, "FULL" this clearly establishes that the Respondent's responses were not sufficient and did not provide the Union with the requested information.

In sum, the ALJ properly concluded that Respondent violated section 8(a)(5) of the Act by unlawfully refusing to provide a full and unredacted copy of the HSP agreement as requested on numerous dates between November 23, 2015 and May 19, 2016. ALJD p. 11 lines 14-15.

III. THE RESPONDENT WAS NOT DENIED DUE PROCESS BY THE ALJ PROPERLY EXERCISING HIS DISCRETION AND FINDING A VIOLATION BASED UPON A DIFFERENT LEGAL THEORY THAN WAS ADVANCED BY THE GENERAL COUNSEL.

Contrary to Respondent's contention in their Exception 8 the ALJ properly exercised his discretion in finding a violation under a different legal theory than was advanced by the General Counsel and no due process concerns were implicated. In finding a violation, the ALJ correctly relied on *Local 58, International Brotherhood of Electrical Workers (Paramount Industries, Inc.)*, 365 NLRB No. 30, slip op. at 4 fn. 17 (2017), where the Board found a violation on a theory that was not advanced by the General Counsel where: (1) the violation was alleged in the complaint; (2), the factual basis for the violation was clear from the record; (3) the law was well established; and (4) no due process concerns were implicated. In fact, the Board, with court approval, has repeatedly found violations for different reasons and on different theories from those of administrative law judges or the General Counsel, even in the absence of exceptions, where the unlawful conduct was alleged in the complaint. See, e.g., *Riverside Produce Co.*, 242 NLRB 615, 615 fn. 2 (1979) where there Board adopted the ALJ's finding that the Employer separately violated Section 8(a)(5) of the Act and held "although the complaint did not specifically allege the foregoing violations found by the Administrative Law Judge, the

allegations were generally encompassed in the complaint, the issues were fully litigated at the hearing, and the record fully supports his conclusions. ". ALJD p. 11 fn.22. Further, in *Miners' Welfare, Pension and Vacation Funds,* 256 NLRB 1145, fn. 21 (1981), the Board adopted the ALJ's findings of an 8(a)(1) violation harassment when the Employer failed to issue a new door key to employees and held that "although this allegation was not specifically alleged in the complaint, such allegation was generally encompassed by the complaint." Citing *Gerald G. Gogin d/b/a Gogin Trucking,* 229 NLRB 529 (1977).

In the instant case, the ALJ correctly found that no factual disputes existed and the Complaint alleged that Respondent had engaged in unlawful conduct by its refusal to provide the Union with a full unredacted copy of the HSP agreement. The parties similarly agreed, in a stipulation, that the issue in this case was "Whether the Respondent has violated Section 8(a)(5) of the Act by failing and refusing to provide the Union with a full unredacted copy of the [HSP agreement] between DirecTV and DirectSat." (Jt. M. p. 2.) Thus, it is clear that the Complaint allegation and statement of the issue in this case were sufficiently broad to encompass the ALJ's legal theory. ALJD p. 11, ft. 22. In fact, the ALJ properly noted that the Respondent addressed the theory, under which he found a violation, in its brief by repeatedly arguing that the Union did not object to its initial response. ALJD p. 11, ft. 22. In doing so, the Respondent clearly advanced the contention that its initial response was adequate under the law. ALJD p. 11, ft. 22. Therefore, Respondent was not denied due process in this case given that long-standing Board law clearly supports the ALJ's discretion in finding a violation under a different legal theory.

IV. CONCLUSION

Based on the foregoing, the ALJ properly concluded that the Union was entitled to a full unredacted copy of the HSP agreement inasmuch as it was necessary and relevant to the Union's performance of its duties as the collective-bargaining representative of unit employees. By repeatedly refusing to provide it to the Union, Respondent violated Section 8(a)(5) of the Act. Accordingly, the General Counsel respectfully requests that Respondent's Exceptions be rejected in their entirety.

Dated at Chicago, Illinois, this 19th day of October 2017.

Respectfully submitted,

/s/ Elizabeth S. Cortez
Elizabeth S. Cortez
Counsel for the General Counsel
National Labor Relations Board
Region 13
219 South Dearborn Street, Suite 808
Chicago, Illinois 60604

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Counsel for the General Counsel's Cross-Exceptions to the Decision of the Administrative Law Judge were electronically filed with the National Labor Relations Board on this 19th day of October 2017, and true and correct copies of the document have been served on the parties in the manner indicated below on the same date.

Via Electronic Mail:

Douglas J. Klein, Attorney
JACKSON LEWIS P.C.
666 Third Avenue
New York, NY 10017
Email: kleind@jacksonlewis.com

Gilbert Cornfield, Attorney
CORNFIELD AND FELDMAN LLP
25 East Washington Street
Suite 1400
Chicago, IL 60602
Email: gcornfield@cornfieldandfeldman.com

/s/ Elizabeth S. Cortez
Elizabeth S. Cortez
Counsel for the General Counsel
National Labor Relations Board
Region 13
219 South Dearborn Street, Suite 808
Chicago, Illinois 60604

United States Government
NATIONAL LABOR RELATIONS BOARD
Office of the Executive Secretary
1015 Half Street, SE
Washington, DC 20570

Telephone: 202-273-1736
Fax: 202-273-4270

leigh.reardon@nlrb.gov
www.nlrb.gov

October 19, 2017

Re: DirectSat USA, LLC
Case 13-CA-176621

Gilbert A. Cornfield, Counsel for the Union
Cornfield and Feldman LLP
25 East Washington Street
Suite 1400
Chicago, IL 60602-1803

Dear Counsel:

This will acknowledge receipt on October 16, 2017 of the Union's Response to Respondent's Exceptions and Union's Cross-Exceptions. This document is rejected for two reasons:

1) To the extent that it contains cross-exceptions and a brief in support, it is untimely. The due date for filing cross-exceptions was September 28, 2017. While an extension of time to file answering briefs was granted to all parties to October 19, 2017, that extension did not extend the time for filing cross-exceptions (see September 22, 2017 letter from Associate Executive Secretary Qureshi, footnote 1).

2) To the extent that the document is both a response to Respondent's Exceptions (an answering brief), and cross-exceptions with supporting argument (brief in support of cross-exceptions), it is an improper filing. Section 102.46(h) of the Board's Rules and Regulations provides that "[a]ny brief filed pursuant to this section must not be combined with any other brief,..." You have essentially combined an answering brief with a brief in support of cross-exceptions.

Accordingly, I cannot transmit your document to the Board for consideration. Although it is too late to file cross-exceptions (unless you can establish "excusable neglect"), **should you still desire to file an answering brief, absent cross-exceptions, you may do so by conforming the brief to the Rules and resubmitting it. Such a conformed answering brief must be filed by close of business on October 26, 2017. No extension will be granted for the conforming and refiling of this brief**. Further, you are cautioned not to make additional argument or other substantive changes (apart from deleting cross-exceptions and argument in support of cross-exceptions) when conforming and resubmitting your answering brief. This additional time to resubmit your answering brief **does not serve as an extension to the other**

parties for filing reply briefs to answering briefs. Thus, reply briefs to answering briefs remain due on November 2, 2017.

Very truly yours,

/s/ Leigh A. Reardon
Associate Executive Secretary

cc: Parties

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIRECTSAT USA, LLC	)	
	)	
Respondent	)	
	)	
and	)	Case No. 13-CA-176621
	)	
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 21, AFL-CIO	)	
	)	
Charging Party	)	

UNION'S REVISED RESPONSE TO RESPONDENT'S EXCEPTIONS

The Union hereby files a Response to the Respondent's Exceptions to the Decision of the Administrative Law Judge (ALJ).

Statement of the Case

There is a single issue which is the subject of this proceeding: Whether the Union, as the certified bargaining representative of a group of technicians employed by the Respondent, is entitled to the contract between the Respondent and DirecTV. DirectSat, the Respondent, installs and services satellite TV services for DirecTV pursuant to an agreement between DirectSat and DirecTV entitled the Home Service Provider Agreement (the HSPA).

In the course of the negotiations for a first collective bargaining agreement between the Respondent Employer and the Union,

the Union requested that the Respondent provide a full copy of the HSPA. When the Respondent failed and refused to provide a full unredacted copy of the agreement, the Union filed an unfair labor practice charge resulting in the issuance of the subject unfair labor practice Complaint followed by the ALJ's decision.

The ALJ held that the Respondent was obligated to provide the Union with a full copy of the HSPA based upon his determination that the Respondent could not unilaterally determine what is or is not relevant in the document to the Union's functioning as the exclusive bargaining representative of the technicians.

The Respondent's Exceptions

In their Exceptions the Respondent contends that the ALJ went beyond the Stipulated Record before him by holding that the Union had the right to the full copy of the HSPA in order to independently determine the relevancy of its provisions to the existing wages, hours and working conditions of the technicians represented by the Union.

When reviewing the Record and the ALJ's decision, it is important to bear in mind that the technicians represented by the Union are compensated on a "piece work" basis; they are paid on the type of installation or service they perform for a customer and the measure of the quality of their work.

The Union submits that the Stipulated Record before the ALJ substantiates the Union's right as the bargaining representative to the HSPA in order to determine whether and to what extent the standards used to compensate the technicians on a piece work basis are established or controlled by the agreement between DirectSat and DirecTV.

The Key Exhibits In The Stipulated Record With Respect To The Respondent's Exceptions

We have focused on those Exhibits which are specifically relevant to the ALJ's decision that the HSPA is relevant to the Union's ability to effectively bargain over the hours, wages and working conditions of the technicians as piecework workers and DirecTV's role in establishing and implementing the standards used to evaluate and compensate the technicians.

The Exhibits all relate to the uncompleted negotiations between DirectSat and the Union beginning in 2015 through 2016 toward a collective bargaining agreement.

Exhibit 11 is a Respondent's proposal on November 4, 2015 stating in part, "In the event the Employer is engaged with respect to products or services other than *those provided pursuant to its Home Service Provider agreement with DirecTV*, such work shall not be deemed bargaining unit work."

Exhibit 12 is a response from Union representative Dave

Webster on November 23, 2015 to Employer representative Lauren Dudley which in part requested a copy of the "HSP agreement with DTV [since]...a copy of the agreement [has been] referenced in the [company's] proposal." Webster also stated in the same communication: "Also referenced in a proposal are performance standards utilized by the 'Employers customer'. We'd like to see the standard that DTV is asking you to meet. To be clear, not the metrics used by DSat derived *from* the standards set by the Employers customer, but the actual standards from DTV that DSat used to form the scorecard metrics."

Exhibit 13 is another communication from Webster to Dudley on December 4, 2015 repeating the same information and document requests he advanced in Exhibit 12 above.

Exhibit 15 is Respondent's attorney Eric Simon's response on February 20, 2016 to Webster's communication to Dudley. In his email to Webster, Simon first stated that he had assumed that Webster was asserting that DirectSat and DirecTV "shared work." Simon then stated that the two companies do not "share" work but that "DirectSat only performs the work that DirecTV authorizes it to perform."

Exhibit 16 is Webster's response to Simon on March 18, 2016 in which he again requests a full copy of the HSPA in order to determine to what extent a technician's "scorecard" (the basis for determining wages) "...is decided and controlled by DirecTV and the

agreement's relationship to the Employer's New Product Lines proposal."

Exhibit 18 on April 5, 2016 is a follow up email from Webster to Simon repeating his requests for the HSPA in order to determine "...how the technician's scorecard is determined Not only the metrics, but how the metrics are determined and by whom." Webster then repeats that the Employer referenced the HSPA in connection with the New Product Lines proposal.

Exhibit 19 on April 6, 2016 from Simon to Webster "...attached per your request are the current metrics established by DirecTV to measure the performance of DirectSat." However, the attachment is almost entirely redacted, including the "Performance Standards" except for "definitions and calculations".

Exhibit 20 on May 19, 2016 is Webster's response in which he renewed his "...request for a FULL copy of the HSP agreement between Direct Sat and DirecTV/AT&T...."

Exhibit 21 on May 21, 2016 contains Simon's response that no additional information will be provided to the Union coupled with Webster's response in which he renewed the request "...for a FULL copy of the HSP agreement...."

Exhibit 22 on May 23, 2016 is the last document in the Stipulated Record in which Simon wrote to Webster in which he stated: "DirectSat has provided Local 21 with those portions of its contract with DirecTV which may have some relevance to our

negotiations-the scope of work covered by the HSP agreement and the metrics used by DirecTV to evaluate the performance of DirectSat under the HSP agreement."

The following conclusions can be reached based upon an objective and neutral review of the Exhibits:

1. DirecTV assigns the work to be performed by the DirectSat technicians;

2. DirecTV has established the "Performance Standards" to be used in evaluating the assigned work. The actual performance standards have been redacted from that part of the HSPA which the Respondent has provided the Union. Since the technicians are paid on a piecework basis, the performance standards directly bear on how the technicians are evaluated and compensated; i.e, how and by whom are the "metrics" determined.

3. The Respondent has based its proposal in negotiations with respect to the scope of the Union's work jurisdiction in part on the HSPA.

The ALJ's Decision

The ALJ decided, after reviewing the Stipulated Record, that the Union was entitled to receive "...a full, unredacted copy of the Home Service Provider agreement between the Respondent and

DirecTV. The HSP agreement is necessary and relevant to the Union's performance of its duties as the collective-bargaining representative of unit employees." (ALJ decision, p. 12)

The ALJ's decision was based upon the following review of the Stipulated Record:

1. The Respondent referenced the HSPA in connection with the Respondent's proposed definition of "bargaining unit work" to be incorporated in the collective bargaining agreement between the parties;

2. Citing *Piggly Wiggly Midwest*, 357 NLRB at 2357-2358, the ALJ stated:

> "...the factual situation here is similar to that in *Piggly Wiggly*, supra. In that case, a union requested sales and franchise agreements from an employer, whom it suspected had an alter-ego relationship with certain franchisees. The employer argued, in part, that the requested information waw unnecessary, because its attorney had provided one paragraph of an agreement to the union and later told the union that the documents requests contained no other relevant information. The judge rejected the employer's argument that the response was sufficient and it did not have to provide the full agreements. The judge stated: 'he [u]nion is not required to take the [employer's] word for it, but has the right to assess and verify for itself the accuracy of the [employer's] claims in bargaining.' The Board adopted the judge's conclusion that the employer violated the Act, by delaying in providing the agreements. ...." (ALJ decision,

p. 10)

The ALJ then went on to state: "Furthermore, the Union's inability to identify other specific relevant information in the HSP agreement cannot be held against it, since it has never seen the agreement. *Olean General Hospital*, 363 NLRB No. 62 slip op. at 7 (2015). (ALJ decision, p. 10)

Conclusion

The Union therefore requests that the Board reject the Exceptions filed by the Respondent to the ALJ's decision.

Respectfully submitted,

CORNFIELD AND FELDMAN LLP

October 23, 2017

BY: _____
GILBERT A. CORNFIELD

Attorneys for the Union

25 East Washington Street
Suite 1400
Chicago, IL 60602-1803
Phone: (312) 236-7800
F a x: (312) 236-6686

STATE OF ILLINOIS)
) SS
COUNTY OF C O O K)

AFFIDAVIT OF SERVICE

SHARON A. FARMER, being first duly sworn upon oath, deposes and states that she served the foregoing **UNION'S REVISED RESPONSE TO RESPONDENT'S EXCEPTIONS** by electronically filing same with the National Labor Relations Board Office of the Executive Secretary and by emailing and mailing a true and accurate copy of same to the following, with proper postage prepaid, on the 23rd day of October, 2017:

Elizabeth S. Cortez, Counsel
For the General Counsel
NLRB Region 13
Dirksen Federal Bldg.
219 South Dearborn Street
Suite 808
Chicago, IL 60604
Email: elizabeth.cortez@nlrb.gov

Eric P. Simon, Esq.
Douglas J. Klein, Esq.
JACKSON LEWIS P.C.
666 Third Avenue
New York, NY 10017
Email: kleind@jacksonlewis.com

Sharon A. Farmer
SHARON A. FARMER

Subscribed and sworn to before me
this 23rd day of October, 2017.

Notary Public

OFFICIAL SEAL
MARIANITA H TRAILER
NOTARY PUBLIC, STATE OF ILLINOIS
COOK COUNTY
MY COMMISSION EXPIRES 08/12/2020

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIRECTSAT USA, LLC Respondent, -and- INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 21, AFL-CIO, Union.	Case No. 13-CA-176621

RESPONDENT DIRECTSAT USA, LLC'S REPLY BRIEF IN FURTHER SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Pursuant to Section 102.46 of the National Labor Relations Board's ("NLRB" or the "Board") Rules and Regulations, Respondent DirectSat USA, LLC ("DirectSat" or "Respondent") submits this Reply Brief in Further Support of its Exceptions to the July 20, 2017 Decision and Order ("Decision") of Administrative Law Judge ("ALJ") Charles J. Muhl. DirectSat excepts to the ALJ's finding that DirectSat violated Section 8(a)(5) and (1) of the National Labor Relations Act ("NLRA" or "Act"). (D. 11:23-24).[1]

ARGUMENT

I. GENERAL COUNSEL AND THE UNION CONCEDE THAT THE ALJ DID NOT FIRST PROPERLY FIND THAT A FULL, UNREDACTED COPY OF THE HSP AGREEMENT IS RELEVANT

The ALJ erred as a matter of law in finding that Respondent violated the Act by not providing the Union with a full, unredacted copy of the Home Service Provider agreement

[1] "(D. __)" references the Decision by page and line numbers.

("HSP Agreement") between Respondent and DirecTV because the ALJ did not, in the first instance, find the unredacted copy of the HSP agreement relevant to the collective bargaining process. Therefore the ALJ's decision must be overturned. See generally Respondent's Brief in Support of Its Exceptions to the Decision of the Administrative Law Judge ("Respondent's Moving Brief" or "Respondent's Mov. Br.") at 8. Counsel for the General Counsel's ("General Counsel") October 19, 2017 Brief in Answer To Respondent's Exceptions ("GC's Br.") and Charging Party International Brotherhood of Electrical Workers, Local Union 21, AFL-CIO's ("Union") October 23, 2017 Revised Response to Respondent's Exceptions ("Union's Br.")[2] do not refute this fundamental error by the ALJ and thus concede the ALJ failed to find relevance of the full, unredacted HSP agreement in the first instance. In attempting to rationalize the ALJ's decision, General Counsel and the Union both ignore this critical omission, adopting the same flawed reasoning as the ALJ to argue why the decision was correct. The Board should reject this flawed reasoning and overturn the ALJ's finding.

The relevance of information sought by a union must be established before the employer is obligated to produce information. Relevance is not established under the Act and Board law simply because the Union requested to see information that is not presumptively relevant to establish relevance. To conclude otherwise as the ALJ did is circular and illogical.

In all of the cases relied on by the ALJ, relevance of the requested information was appropriately established before finding a violation of Section 8(a)(5) of the Act. See Piggly Wiggly Midwest, LLC, 357 NLRB 2344, 2344 (2012) ("We agree with the judge that the

[2] On October 16, 2017, the Union filed its Response to Respondent's Exceptions and Union's Cross-Exceptions. By letter dated October 19, 2017, Leigh A. Reardon, Associate Executive Secretary, advised the Union that the Union's cross-exceptions were untimely and improperly combined with its answering brief to Respondent's exceptions. The Union was directed to resubmit its answering brief to Respondent's exceptions (without cross-exceptions) no later than October 26, 2017. The Union filed its revised response on October 23, 2017, appropriately omitting its untimely cross-exceptions from the revised response.

Union established the relevance of the information [requested] to its concern that the franchisees were alter egos of the Respondent.");[3] Knappton Maritime Corp., 292 NLRB 236, 239 (1988) (". . . we find that the Union has established . . . that the information [requested] in the agreement is relevant to the Union's determination of whether to file a grievance or take other action to assure the contractual rights of the employees [it represents]."); Southern Oil Coal Co., 315 NLRB 835 (1994) (where the Board affirmed the ALJ's conclusion that "upon the foregoing essentially uncontroverted evidence and cited legal authority, that the Union's request for a complete copy of the purchase and sale agreement was relevant and necessary to its processing the subject employees' grievances concerning their contract right to panel for employment at Respondent (SOCC's) other mining operations, as well as for other employees' interest which may have been affected by the sale transaction."). In the instant case, it is undisputed that there was no finding that a full, unredacted copy of the HSP agreement was presumptively relevant to the bargaining process or that the Union ever identified the relevance of its request for the document.

The ALJ appropriately rejected all of the General Counsel's proffered reasons to establish relevance of a full, unredacted copy of the HSP Agreement. (D. 7-9); see generally Respondent's Mov. Br. at 8-9. Then, instead of dismissing the Complaint, the ALJ invented his only theory of relevance, finding that a full, unredacted copy of the HSP Agreement is relevant because the Union is entitled to verify the Respondent's claim that it has provided all relevant information (see Respondent's Mov. Br. at 2-3). However, there is no basis in the law to uphold this invented theory. None of the cases cited by the ALJ – and indeed no Board case of which Respondent is aware – has ever held that relevance can be established because Union is entitled to verify the employer's claim that it has provided all of the relevant information to assess an

[3] The Union's Br. did not address any cases relied on by the ALJ other than Piggly Wiggly. Accordingly, the Union conceded to all of Respondent's arguments about why the other cases relied on by the ALJ are inapposite.

employer's assertion that certain information is not relevant to the bargaining process. See Respondent's Mov. Br. at 10-11.

General Counsel's contention that Respondent never made an attempt to show the Union that the remainder of the HSP agreement lacked information relevant to the scope of work is similarly flawed. (D. 11:1-2); see GC's Br. at 4. Accepting this reasoning, the Union would have unfettered access to information that is not presumptively relevant upon the employer's assertion that the requested information is not relevant, and an employer could never challenge the relevancy of requested information without waiving its objection. See Respondent's Mov. Br. at 11. The Act does not permit let alone contemplate this outcome.[4]

It makes no difference that there was a reference to the HSP agreement in one of Respondent's proposals. See GC's Br. at 3. Indeed, the ALJ duly acknowledged that the information in the HSP agreement concerning the scope of unit work was relevant to the Union's representation (D. 9:41-42), but there was no dispute over the relevance of such information. (D. 9:41-42 n.21). Also, the stipulated factual record is clear that DirectSat provided the Union with all of the information concerning the scope of bargaining unit work covered by the HSP Agreement and the metrics used by DirecTV to evaluate the performance of DirectSat, and the Union never objected. JSF ¶ 31; JSF Ex. 22. See generally Respondent's Mov. Br. at 9-10.

General Counsel also argues it was appropriate for the ALJ to infer that DirectSat's initial response to the Union was insufficient because of the Union's subsequent requests for the full HSP Agreement and the fact that the word "FULL" was capitalized in the Union's requests. GC's Br. at 6-7. This argument, too, should be rejected. Although the ALJ

[4] This flawed reasoning also explains why the ALJ misapplied Olean General Hospital, 363 NLRB No. 62 (2015). Olean General Hospital does not stand for the proposition that the employer must provide the Union with information that is not presumptively relevant to support its objection to producing such information. See Respondent's Mov. Br. at 9-10.

agreed with DirectSat that the Union never objected to DirectSat's responses to requests for the HSP Agreement as inadequate (D. 11:5-6), the ALJ nevertheless, without any explanation or factual or legal support, found that "[t]he Union's conclusion that the initial response was not sufficient obviously can be inferred from its subsequent requests for the agreement." (D. 11:4-10). However, the ALJ's inference is belied by the stipulated record conclusively establishing that the Union changed its stated reason for its request for the HSP Agreement over time. See Respondent's Mov. Br. at 10 n.6.

Moreover, General Counsel's reasoning about why "FULL" was capitalized is speculative. There is no evidence in the record about why "FULL" was capitalized. In fact, the ALJ did not find significance in the word "FULL" being capitalized—he said nothing of it in his decision. Contrary to General Counsel's speculation, the stipulated factual record established that DirectSat provided the Union with all of the relevant information concerning the scope of bargaining unit work covered by the HSP Agreement and the metrics used by DirecTV to evaluate the performance of DirectSat, and the Union never objected (JSF ¶ 31; JSF Ex. 22).

As a matter of law, because there was no finding in the first instance that a full, unredacted copy of the HSP Agreement was relevant to the bargaining process, the ALJ erred in finding that DirectSat violated the Act by refusing to provide a full, unredacted copy of the HSP Agreement.[5]

[5] The ALJ also erred by not granting Respondent's motion to strike the section of the Union's brief entitled "How A Technician's Earnings Are Determined." See Respondent's Mov. Br. at 11 n.7. General Counsel did not offer any response to this argument in its answer to Respondent's exceptions, and the Union did not timely offer any arguments in response. Therefore, General Counsel and the Union conceded this point. Accordingly, the ALJ's decision not to strike the section of the Union's brief entitled "How A Technician's Earnings Are Determined" should be overturned for all of the reasons stated in Respondent's Moving Brief.

II. THE UNION'S RESPONSE TO RESPONDENT'S EXCEPTIONS BRIEF REAFFIRMS THAT AN ALLEGED JOINT EMPLOYER RELATIONSHIP WITH DIRECTV IS THE ACTUAL REASON THE UNION IS REQUESTING A FULL, UNREDACTED COPY OF THE HSP AGREEMENT, BUT THE ALJ ALREADY REJECTED THAT REASON TO PRODUCE THE INFORMATION REQUESTED.

In its answering brief, the Union argues that the stipulated record before the ALJ substantiates the Union's right to the HSP agreement in order to determine whether and to what extent the standards used to compensate bargaining unit members on a piece rate basis are established or controlled by DirecTV. Union's Br. at 3. As an initial matter, the Union continues to ignore fundamental procedural requirements by introducing facts outside the stipulated record ("[w]hen reviewing the Record and the ALJ's decision, it is important to bear in mind that the technicians represented by the Union are compensated on a 'piece work' basis; they are paid on the type of installation or service they perform for a customer and the measure of the quality of their work."). Union's Br. at 2. There is nothing in the stipulated record about how technicians are paid or why. The Union is attempting yet another end-run around the Parties' stipulation to save its meritless charge from dismissal. Introduction of facts outside the stipulated record is completely inappropriate and the Board should ignore these purported facts. Indeed, the ALJ already partially granted Respondent's Motion to Strike portions of the Union's brief because they were not a part of the stipulated record. (D. 12:4 n.23) ("Thus, I agree with Respondent that, in this regard, the Union is inappropriately seeking to introduce new facts that are not properly before me for consideration.").

In any event, there is no allegation in the Complaint that DirectSat failed to provide the Union with complete information about DirecTV metrics. Therefore, the Union's argument about metrics is irrelevant to the issue in this case. It is also is striking that despite the ALJ rejecting both of the General Counsel's proffered arguments to establish relevance of a full,

unredacted copy of the HSP Agreement (that the Union needed to determine if DirectSat and DirecTV were joint employers for purposes of collective bargaining or to verify the accuracy of DirectSat's claims concerning its relationship with DirecTV) (D. 7:24-34; 8:1-34; D. 9:4-36), the Union is still attempting to rely on an alleged joint employer theory to justify its request for a full, unredacted copy of the HSP agreement. Incredibly, at this stage of the litigation, when the General Counsel appropriately abandoned the alleged joint employer relationship theory because the ALJ found the General Counsel did not satisfy its burden to establish relevance on that theory, the Union still believes it is entitled to a full, unredacted copy of the HSP agreement based on an alleged joint employer theory. The Board should not permit the Union to obtain the information it seeks under these circumstances.

III. DIRECTSAT WAS NOT AFFORDED DUE PROCESS BECAUSE THE ALJ INVENTED HIS OWN, UNLITIGATED THEORY OF THE CASE TO FIND A VIOLATION OF THE ACT

DirectSat was denied its due process rights when the ALJ found a violation of the Act on his theory after the General Counsel's failure to satisfy its burden of proof regarding the relevancy of a fully, unredacted copy of the HSP Agreement. Respondent's Mov. Br. at 12-13. Of course there were no factual disputes. See GC's Br. at 8. The Parties stipulated to a factual record. However, DirectSat was never afforded an opportunity before the ALJ to litigate the theory (invented by the ALJ after rejection of all of the General Counsel's theories) on which the ALJ found a violation. Under the circumstances, DirectSat could not have been expected to respond to every possible theory that could ever be brought forth to find a violation, and therefore it was denied due process.

CONCLUSION

For the foregoing reasons and those set forth in Respondent's Brief in Support of its Exceptions, the Board should overturn the ALJ's decision and dismiss the Complaint in its entirety with prejudice.

Dated: November 2, 2017

Respectfully submitted,

By _____

Eric P. Simon
Douglas J. Klein
JACKSON LEWIS P.C.
666 Third Avenue
29th Floor
New York, NY 10017
(212) 545-4000
Counsel for Respondent

CERTIFICATE OF SERVICE

The undersigned affirms that on November 2, 2017, Respondent's Reply Brief in Further Support of Exceptions to Administrative Law Judge Charles Muhl's Decision was filed with the National Labor Relations Board using the e-filing system at www.nlrb.gov, and that copies were served on the following individuals by electronic mail:

Elizabeth Cortez, Esq. Counsel for the General Counsel National Labor Relations Board, Region 13 219 S. Dearborn St., Suite 808 Chicago, IL 60604 Elizabeth.Cortez@nlrb.gov
Gilbert A. Cornfield, Esq. Cornfield and Feldman LLP 25 East Washington Street, Suite 1400 Chicago, IL 60602-1708 GCornfield@cornfieldandfeldman.com

JACKSON LEWIS P.C.
Attorneys for Respondent

Dated: November 2, 2017

By: _____
Douglas J. Klein
JACKSON LEWIS P.C.
666 Third Avenue, 29th Floor
New York, New York 10017
(212) 545-4020

DirectSat USA, LLC *and* International Brotherhood of Electrical Workers, Local Union 21, AFL–CIO. Case 13–CA–176621

March 20, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND EMANUEL

On July 20, 2017, Administrative Law Judge Charles J. Muhl issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party Union filed answering briefs, and the Respondent filed a reply.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

To begin, we disagree with the Respondent's claim that the judge violated its due process rights by deciding this case on a legal theory that was not advanced by the General Counsel. Before the judge, the General Counsel argued that the Union needed to review the full, unredacted Home Services Provider (HSP) subcontracting agreement between DirecTV and the Respondent in order to determine whether those entities were joint employers for purposes of collective bargaining, or alternately to verify the Respondent's claims about the nature of their relationship. The judge rejected both arguments and found instead that the Union was entitled to see the full HSP to verify the Respondent's claim that it had furnished all portions of that document relative to the scope of bargaining-unit work.

"The Board, with court approval, has repeatedly found violations for different reasons and on different *theories* from those of administrative law judges or the General Counsel, even in the absence of exceptions, where the unlawful conduct was alleged in the complaint." *Local 58, Int'l Brotherhood of Electrical Workers (IBEW), AFL–CIO* (*Paramount Industries, Inc.*), 365 NLRB No. 30, slip op. at 4 fn. 17 (2017) (emphasis in original) (citing cases); accord, e.g., *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1169 (D.C. Cir. 1993), cert. denied 511 U.S. 1003 (1994). When analyzing whether a judge's finding of a violation on a theory that was not clearly articulated by the General Counsel violates a respondent's due process rights, the Board considers (1) whether the language of the complaint encompasses the legal theory upon which the violation was found; (2) whether the factual record is complete, or, in other words, whether the facts necessary to find a violation under the theory in question were litigated; (3) whether the law is well established; and (4) the General Counsel's representations about the theory of violation, and the differences between the litigated theory and the theory upon which the judge relied in finding the violation. See, e.g., *Paramount Industries*, supra (factors (1), (2), and (3)); *Sierra Bullets, LLC*, 340 NLRB 242, 242–243 (2003) (factor (4)). We agree, for the reasons stated by the judge, that the first two factors were satisfied in this case. Furthermore, although the judge omitted the other two factors from his analysis, on this record we are satisfied that both are met as well. As to the third factor, it is well settled that unions have a legal right to assess and verify for themselves the accuracy of employers' claims in bargaining. See, e.g., *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152–153 (1956); *Caldwell Mfg. Co.*, 346 NLRB 1159, 1160 (2006); *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994). And as to the fourth factor, the Respondent does not, and cannot, claim to have relied on the General Counsel's representations of the case in preparing its defense. Indeed, the case was submitted on a stipulated record and the parties' briefs to the judge were due on the same day. Moreover, we note that the Respondent has not identified any evidence it would have produced, or any specific defense it would have

[1] The Respondent excepts to the judge's partial denial of its motion to strike portions of the Union's brief to the judge, which allegedly offered factual assertions and conclusions based on evidence not contained in the stipulated record. We find it unnecessary to pass on that exception because the judge did not rely on those portions of the Union's brief and, in any event, those allegedly extraneous facts would not affect the result in this case.

[2] The Board does not rely on the judge's statement that, in cases where a union requests information relative to matters outside the bargaining unit, "the standard is somewhat narrower and relevance is required to be somewhat more precise." The Board has found that a union satisfies its burden to establish the relevance of non-unit information if it demonstrates either "a reasonable belief, supported by objective evidence, that the requested information is relevant," *Disneyland Park*, 350 NLRB 1256, 1257–1258 (2007) (citation omitted), or "a 'probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities,'" *Kraft Foods North America, Inc.*, 355 NLRB 753, 754 (2010) (quoting *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967)). Either way, the Board has consistently emphasized that the required showing is subject to the same broad, "discovery-type standard" applicable to other information requests, and that the union's burden is therefore "not an exceptionally heavy one." *Kraft Foods*, supra (internal quotation marks and citations omitted); accord, e.g., *A-1 Door & Building Solutions*, 356 NLRB 499, 500 (2011); *Public Service Electric & Gas Co.*, 323 NLRB 1182, 1186 (1997); *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994).

[3] We shall modify the judge's recommended Order and remedial notice to conform to the Board's standard remedial language.

otherwise put forth, if it had known the judge would decide the case as he did.

As to the merits of the judge's finding, we agree that the Respondent was obligated to provide the full, unredacted HSP to the Union in order for the Union to evaluate the extent of work covered by the Respondent's proposal. We observe that the Respondent's proposal with regard to new product lines effectively amounted to having the scope of bargaining-unit work defined by the HSP. A union cannot be reasonably expected to integrate another agreement between the employer and a third party into its own collective-bargaining agreement without having a complete understanding of the contents of the incorporated document and the context of the relevant portions within the document as a whole. The Respondent thus rendered the entire HSP relevant to the negotiation, giving rise to a duty to provide the full, unredacted document to the Union.[4]

ORDER

The Respondent, DirectSat USA, LLC, South Holland, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the International Brotherhood of Electrical Workers, Local Union 21, AFL–CIO, by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, provide the Union with a full, unredacted copy of the Home Service Provider agreement between the Respondent and DirecTV.

(b) Within 14 days after service by the Region, post at its facility in South Holland, Illinois, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 18, 2016.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 13 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 20, 2018

_____
Mark Gaston Pearce, Member

_____
Lauren McFerran, Member

_____
William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

[4] We further note that the Respondent did not, at any point, object to disclosing the full HSP on grounds that doing so could reveal information of a confidential, proprietary, or trade-secret nature. In addition, Member Emanuel observes that the Respondent did not assert a confidentiality interest in its exceptions.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with the International Brotherhood of Electrical Workers, Local Union 21, AFL–CIO (the Union), by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the exclusive collective-bargaining representative of employees in the following appropriate bargaining unit:

All full-time and regular part-time Installation/Service Technicians employed by the Employer at its facility located in South Holland, Illinois, but excluding all other employees, confidential employees, guards, and supervisors as defined in the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL furnish to the Union in a timely manner the information requested by the Union on March 18 and May 19, 2016.

DIRECTSAT USA, LLC

The Board's decision can be found at www.nlrb.gov/case/13-CA-176621 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Elizabeth S. Cortez, Esq., for the General Counsel.
Eric P. Simon, Esq. and *Douglas J. Klein, Esq. (Jackson Lewis P.C.),* of New York, New York, for the Respondent.
Gilbert Cornfield, Esq. (Cornfield and Feldman LLP), of Chicago, Illinois, for the Charging Party.

DECISION

CHARLES J. MUHL, Administrative Law Judge. The General Counsel's complaint in this case alleges that DirectSat USA, LLC (the Respondent) unlawfully refused to provide information to Local Union 21 of the International Brotherhood of Electrical Workers, AFL–CIO (the Union). That Union represents the Respondent's installation and service technicians, who perform work for DirecTV, Inc. under a subcontract. The information at issue is a full and unredacted copy of the Respondent's contract—the "Home Service Provider" agreement—with DirecTV. The situation arose in the context of negotiations for a first contract covering the Respondent's technicians.

On April 10, 2017, the parties filed a joint motion and stipulation of facts requesting that the case be decided without a hearing and based on the stipulated record. On April 14, 2017, I granted the motion and approved the stipulation of facts via written order. Thereafter, the parties filed briefs on May 26, 2017. Based upon those briefs and the entire stipulated record, I find that the Respondent violated the Act as alleged in the complaint.[1]

FINDINGS OF FACT

I. JURISDICTION

The Respondent is engaged in the installation and service of satellite television equipment for DirecTV, from its facility in South Holland, Illinois. In conducting its business operations during the past 12 months, the Respondent has performed services in excess of $50,000 in States other than the State of Illinois. Accordingly, I find that, at all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, as the Respondent admits in its answer to the complaint. I also find, and the Respondent admits, that the Union is a labor organization within the meaning of Section 2(5) of the Act.[2]

II. ALLEGED UNFAIR LABOR PRACTICES

On February 11, 2014, the Union was certified as the exclusive collective-bargaining representative of the Respondent's technicians, pursuant to Section 9(a) of the Act.[3] The Respondent and the Union began negotiations for a first contract on September 4, 2014. Eric Simon, an attorney, represented the

[1] On May 20, 2016, the Union initiated this case by filing the original unfair labor practice charge against the Respondent. Region 13 of the National Labor Relations Board (the Board) docketed the charge as Case 13–CA–176621. On June 13, 2016, the Union filed a first amended charge and, on September 14, 2016, the Union filed a second amended charge. On September 23, 2016, the General Counsel issued a complaint, alleging that the Respondent violated Section 8(a)(5) of the National Labor Relations Act (the Act). On October 5, 2016, the Respondent filed a timely answer to the complaint. Therein, it asserted an affirmative defense, based upon Section 10(b) of the Act.

[2] Stipulation of facts, pars. 7–10.

[3] The full description of this appropriate unit (the Unit) is:

All full-time and regular part-time Installation/Service Technicians employed by the Employer at its facility located at 9951 W 190th St., Mokena, Illinois, 60448, but excluding all other employees, confidential employees, guards, and supervisors as defined in the Act.

The Respondent relocated the Mokena facility to South Holland in or around May 2015.

Respondent in these negotiations.[4]

One of the matters the parties addressed in bargaining was whether new products or services offered by the Respondent would be deemed bargaining unit work. On various dates from November 12, 2014 through September 16, 2015, the Respondent and the Union exchanged written proposals on this topic. The Respondent proposed that such work would be outside the unit. However, at its sole discretion, the Company could assign the new work to unit employees, set their wage rates, and later remove the work without any challenge through the grievance and arbitration procedure. The Union, in turn, proposed having this work assigned to bargaining unit employees. It also sought to retain the right to negotiate the terms and conditions of employment related to this work. Finally, the Union proposed that it be able to submit any disagreements over the new work to the grievance procedure.[5]

The material events regarding the Union's information request at issue in this case took place from November 2015 to May 2016. First, on November 4, 2015, the Respondent submitted a revised proposal on new product lines.[6] The first sentence of that proposal stated: "In the event the Employer is engaged with respect to products or services other than ***those provided pursuant to its Home Service Provider agreement with DirecTV,*** . . . .such work shall not be deemed bargaining unit work." (Emphasis in the original.)

Then on November 23, 2015, Dave Webster, a business representative for the Union, sent an email to Lauren Dudley, the Respondent's human resources director.[7] Webster stated in relevant part: "[O]ne of the company proposals references the HSP agreement with DTV. We'd like a copy of the agreement referenced in the proposal." Dudley responded via email dated December 4, 2015.[8] As to the Home Service Provider (HSP) agreement with DirecTV, Dudley stated: "See attached, relevant to scope of work." She provided a portion of the agreement, with redactions. In the "Recitals," the unredacted provisions described the businesses of DirecTV and the Respondent. Then the "Agreement" section included an "Appointment of Contractor" provision, which stated:

> Authority. DIRECTV hereby engages [the Respondent] to provide services in the installation and maintenance of DIRECTV System Hardware (the "Services," or "Fulfillment Services" when referring specifically to initial customer installation services only) as defined herein and as identified in **Exhibit 1.a.i.** attached hereto for DIRECTV customers located in areas specified in **Exhibit I.a.ii.**, attached hereto. . . .(Emphasis in the original.)

Dudley also provided the two exhibits referenced in this provision. The first gave a description of the work tasks the Respondent would perform for DirecTV under the agreement. The second contained a list of cities in which the Respondent would perform the work.

On February 16, 2016,[9] Webster sent an email to Simon, which stated:

> I have heard that AT&T has extended the DirecTV contract with DirectSat for another 3 years. With AT&T & DirectSat both installing the DirecTV Dish we need to understand the relationship between AT&T & DirectSat and the shared work. Please send a copy of the current agreement between DirectSat & AT&T/DTV for use in bargaining.[10]

Simon responded via email dated February 20.[11] Simon stated therein:

> We have no idea what you have heard or whom you have heard it from, but your "information" is erroneous. DirectSat has entered into no new agreements with AT&T. In early 2015, DirecTV extended its contract with DirectSat through 2018, but there has been nothing further.
>
> As to the substance of your request, you seem to assert is relevant (sic) because you believe DirecTV (I assume you refer to AT&T because of the recent acquisition of DirecTV by AT&T) and DirectSat have "shared" work. Again, you are mistaken. There is no "shared" work. As far as DirectSat is concerned, all of the work is DirecTV's. DirecTV currently has, and always has had, the right to contract as much or as little or none of its satellite TV system installation and service work to DirectSat as it, in its sole discretion, may decide. DirectSat only performs the work that DirecTV authorizes it to perform. DirectSat has never had an exclusive right to install/service DirecTV systems. Just as DirecTV had the ability to decide to whom it would contract with or if it would contract out installation/service work at all prior to the AT&T-DirecTV merger, DirecTV (even as a subsidiary of AT&T) continues to determine what and how much work to contract out. This is not an issue DirectSat has any control over or ever had any control over, and as such is not a mandatory subject of bargaining. Bargaining unit work has been and will continue to be the installation and service of DirecTV systems to the extent and degree DirecTV authorizes DirectSat to perform such work. While Local 21 may have an issue with DirecTV's subcontracting of such work, it is not relevant to our negotiations.

On March 18, Webster resent the original information request to Simon, asking for a full copy of the HSP agreement.[12] Once again, Webster noted the reference to the agreement in

[4] The parties agree that, in that capacity, Simon was a Sec. 2(13) agent of the Respondent.

[5] Stipulation of facts, pars. 16–19; Jt. Exhs. 7–10.

[6] Stipulation of facts, par. 20; Jt. Exh. 11.

[7] Stipulation of facts, par. 21; Jt. Exh. 12.

[8] Stipulation of facts, par. 22; Jt. Exh. 13.

[9] All dates hereinafter are in 2016, unless otherwise specified.

[10] Stipulation of facts, par. 23; Jt. Exh. 14. AT&T acquired DirecTV on or about July 24, 2015.

[11] Stipulation of facts, par. 24; Jt. Exh. 15.

[12] Stipulation of facts, par. 25; Jt. Exh. 16. In this communication, Webster also requested information concerning "how the technician's scorecard is determined. Not only the metrics, but how the metrics are determined and by whom." On April 6, Simon responded with a different, redacted portion of the HSP agreement. (Stipulation of facts, par. 28; Jt. Exh. 19.) This portion listed the categories of performance standards DirecTV set for the Respondent, as well as the definition of each category. The General Counsel does not allege or argue that the Respondent's conduct as to this Union request for information was unlawful.

the Respondent's new product lines proposal. At a bargaining session on March 22, Simon acknowledged the Union's renewed information request. Simon stated that the Respondent already provided the Union with the relevant portions of the HSP agreement. The Union also submitted a revised proposal regarding new product lines. That proposal retained the Respondent's earlier language referencing the HSP agreement, except that the new work was deemed bargaining unit work.

On April 5, the Union again reiterated its request for a full copy of the HSP agreement, based upon the Respondent referencing the agreement in its new product lines proposal.[13]

On May 19, Webster sent the following email to Simon:

> In connection with DirectSat negotiations I renew my request for a FULL copy of the HSP agreement between DirectSat and DirecTV/AT&T in addition to all current agreements with sub contractors, to evaluate the extent of control of DirectSat by DirecTV/AT&T.[14]

Simon responded via email the same day.[15] He said: "We have already provided you with all relevant information regarding this request. We see no reason to supplement our response."

The Union filed the original unfair labor practice charge in this case on May 20. Then on May 22, Simon sent a letter[16] to Webster to "further explicate DirectSat's rational (sic) for declining to provide a complete copy of the HSP Agreement. . . ." Simon stated in relevant part:

> The request for the full copy of the HSP agreement to evaluate DirecTV's control over DirectSat is irrelevant to negotiations between DirectSat and Local 21 regarding terms and conditions of employment of DirectSat employees. The "extent of control" of DirecTV over DirectSat has no bearing on negotiations over wages, hours, or other terms and conditions of employment which are exclusively controlled by DirectSat. As previously explained to you at the table, DirecTV does not, and has no control over the wages paid to DirectSat employees or the metrics used to evaluate the performance of unit employees. These decisions are vested exclusively in DirectSat. For the last 2+ years since Local 21 was certified as the representative of employees of DirectSat's Chicago South (now South Holland location), DirectSat has bargained in good faith over the wages, hours and other terms and conditions of employment of unit employees. DirecTV has no role in these negotiations. DirectSat has never asserted that it cannot agree to a proposal on any issue because DirecTV might disapprove. Nor is the ability of DirectSat to enter into a collective bargaining agreement with Local 21 subject to approval by DirecTV.
>
> DirectSat has provided Local 21 with those portions of its contract with DirecTV which may have some relevance to our negotiations - the scope of work covered by the HSP agreement and the metrics used by DirecTV to evaluate the performance of DirectSat under the HSP agreement. (DirectSat did not object to providing this information on the basis that while DirectSat has full authority to set performance metrics for unit technicians, DirectSat has stated that the metrics established by DirecTV to evaluate DirectSat help inform DirectSat in establishing performance metrics for technicians.)
>
> For all the foregoing reasons, the Union's request for the full HSP contract is not relevant to any issue in negotiations and DirectSat declines to provide it.

ANALYSIS

The General Counsel's complaint alleges that the Respondent violated Section 8(a)(5) by refusing to provide the Union with a full, unredacted copy of its HSP Agreement with DirecTV. The only issue in dispute is the relevance of the agreement to the Union's duties as the bargaining representative of the Respondent's technicians.[17]

I. LEGAL STANDARD

An employer has a statutory obligation to provide to a union that represents its employees, on request, information that is relevant and necessary to the union's performance of its duties as the exclusive collective-bargaining representative. *Piggly Wiggly Midwest, LLC*, 357 NLRB 2344, 2355 (2012); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956). When the union's request deals with information pertaining to employees in the unit that goes to the core of the employer-employee relationship, the information is "presumptively relevant." *National Broadcasting Co., Inc.*, 318 NLRB 1166, 1169 (1995), citing to *Shell Development Co. v. NLRB*, 441 F.2d 880 (9th Cir. 1971). However, an employer's contracts with customers are not presumptively relevant. *F.A. Bartlett Tree Expert Co., Inc.*, 316 NRLB 1312, 1313 (1995). Thus, the Union here must establish the relevance of the information. *Sheraton Hartford Hotel*, 289 NLRB 463, 463–464 (1988). To demonstrate relevancy, a liberal, discovery-type standard applies and the union's initial showing is not a burdensome or overwhelming one. *NLRB v. Acme Industrial Co.*, 385 U.S. at 437; *The New York Times Co.*, 270 NLRB 1267, 1275 (1984). Nonetheless, where the request is for information with respect to matters outside the unit, the standard is somewhat narrower and relevance is required to be somewhat more precise. *Island Creek Coal Co.*, 292 NLRB

[13] Stipulation of facts, par. 27; Jt. Exh. 18.

[14] The General Counsel's complaint only alleges and relies upon the Union's requests for the full HSP agreement dated March 16 and May 19. It does not include the Union's requests dated November 23, 2015, February 16, and April 5.

[15] Stipulation of facts, par. 30; Jt. Exh. 21.

[16] Stipulation of facts, par. 31; Jt. Exh. 22.

[17] In its answer to the complaint, the Respondent asserted a 10(b) defense. It makes no argument in this regard in its brief. In any event, the facts do not support this defense. The Union's first request for the HSP agreement occurred on November 23, 2015. The Respondent provided its partial response on December 4, 2015. The Union again requested the full agreement on February 16. The Respondent's first refusal to provide the full agreement occurred on February 20. Thus, the 10(b) period began to run as of February 20, when the Respondent clearly and unequivocally denied the Union's request for the full agreement. *Quality Building Contractors, Inc.*, 342 NLRB 429, 431 (2004). The Union filed its initial unfair labor practice charge on May 20 and it was served on the Respondent on that same date. (Stipulation of facts, par.1.) Thus, the charge filing occurred well within the required 6-month period from when the alleged unfair labor practice occurred.

480, 487 (1989), citing to *Ohio Power Co.*, 216 NLRB 987, 991 (1975).

II. DID THE UNION HAVE AN OBJECTIVE, FACTUAL BASIS TO SUSPECT THE RESPONDENT AND DIRECTV WERE JOINT EMPLOYERS?

To demonstrate relevance, the General Counsel first argues that the Union needed to determine if DirecTV and the Respondent were joint employers for purposes of collective bargaining.[18] Information concerning the existence of a joint employer relationship also is not presumptively relevant and a union has the burden of demonstrating its relevancy. *Connecticut Yankee Atomic Power Co.*, 317 NLRB 1266, 1267 (1995); *Knappton Maritime Corp.*, 292 NLRB 236, 239 (1988). A union cannot meet its burden based on a mere suspicion that a joint employer relationship exists. It must have an objective, factual basis for so believing. *Kranz Heating & Cooling*, 328 NLRB 401, 402–403 (1999). However, a union is not obligated to disclose those facts to the employer at the time of the information request. *Baldwin Shop 'N Save*, 314 NLRB 114, 121 (1994). It is sufficient if the General Counsel demonstrates at the hearing that the union had, at the relevant time, a reasonable belief.[19] *Cannelton Industries, Inc.*, 339 NLRB 996, 997 (2003).

Both *Connecticut Yankee Atomic Power* and *Kranz Heating & Cooling*, supra, involved situations where unions demonstrated a reasonable belief that two entities were joint employers. In *Connecticut Yankee*, the union investigated the working conditions of subcontracted employees at a plant where it represented permanent employees. The union obtained facts indicating the employer with whom it had the collective-bargaining relationship played a role in the hiring, work scheduling, and supervision of the subcontracted employees. In addition, a union representative became aware of prior Board cases where similar claims of joint employer status were made. In *Kranz Heating*, the union discovered a variety of objective facts suggesting joint employer status. The union there represented employees in a business that allegedly closed. Following the closure, the union determined that a newly formed company was operating the same or similar business from the same location. The new company also was using the same equipment and telephone number. In these cases, the unions formed a reasonable belief of joint employer status based upon their collection of objective facts, before making their information requests. See also *Piggly Wiggly Midwest*, 357 NLRB at 2357–2358; *Knappton Maritime Corp.*, 292 NLRB at 239; *Cannelton Industries, Inc.*, 339 NLRB at 997.

In contrast in this case, the stipulated facts do not establish the Union had an objective basis for believing the Respondent and DirecTV were joint employers, at the time it made the information requests. Prior to its March 16th request, the Union only knew that DirecTV and the Respondent had a contractual relationship, under which the Respondent provided installation and maintenance services to DirecTV. The mere existence of a service contract between two companies is not a sufficient basis to reasonably believe they might be joint employers. If it were, then every agreement between an employer and a subcontractor would be deemed relevant to the question of joint employer status, based upon nothing more than the contract's existence. The Union also knew that both DirecTV and the Respondent installed and serviced DirecTV equipment. But the fact that both companies performed the work, standing alone, is not an objective basis for concluding DirecTV possessed control over how the Respondent did so. When the Union made its May 19th request, the only new information it had obtained were DirecTV's performance standards for DirectSat contained in the HSP agreement. However, nothing therein suggested DirecTV had any control over how the Respondent went about meeting those standards. Finally, the stipulated record contains no additional, contemporaneous facts relied upon by the Union for believing a joint employer relationship existed. Taken together, these minimal facts fall into the category of mere suspicion. The Union needed more here.[20]

III. DID THE UNION NEED THE REQUESTED INFORMATION TO VERIFY CLAIMS MADE BY THE RESPONDENT?

The General Counsel also contends the Union was entitled to the full HSP agreement to verify the accuracy of claims made by the Respondent concerning the relationship between the two entities. Relevance can be established in this fashion. *Caldwell Manufacturing Co.*, 346 NLRB 1159, 1160 (2006) (relevance established where employer made specific factual assertions in bargaining concerning need to improve competitiveness and, thereafter, union requested cost and productivity information in part to evaluate the accuracy of the claims); *Shoppers Food Warehouse Corp.*, 315 NLRB 258, 259 (1994) (union was not required to accept at face value an employer's assertion that two entities were separate operations). The U.S. Supreme Court itself stated in *Truitt Mfg. Co.* that if "an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy." 351 U.S. at 152–153.

In this case, the stipulated facts likewise fail to establish that the Respondent claimed it and DirecTV were not joint employers. Prior to the Union's information requests, the only conceivable assertions Simon made in this regard were in his February 20 letter. Simon said there was no "shared work" between the companies. He also stated repeatedly that DirecTV had the exclusive right to contract out all or none of its work to

[18] In *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015), the Board instituted a revised standard for determining joint employer status. Under that standard, two or more entities are joint employers if they share or codetermine those matters governing the essential terms and conditions of employment. Possessing authority over those terms is sufficient to establish joint employer status. Such terms include the direction of the work force, dictating the number of workers to be supplied, and determining the manner and method of work performance.

[19] Of course, in this case, no hearing occurred. Accordingly, the objective facts relied upon by the Union either must have been disclosed at the time of the requests or included in the stipulation of facts.

[20] Although Webster also stated the Union needed the HSP agreement "for use in bargaining" and "in connection with DirectSat negotiations," such statements are too general and conclusory to establish relevance. *F.A. Bartlett Tree Expert Co.*, 316 NLRB at 1313; *Island Creek Coal Co.*, 292 NLRB at 490 fn. 19.

the Respondent. In evaluating joint employer status, the Board looks to whether the employers share control over terms and conditions of employment, not whether they share work. *Browning-Ferris*, supra. Those terms and conditions include determining the manner and method of employees' work performance, not the amount of work one employer subcontracts to another. The General Counsel has overstated the significance of Simon's statements. See *F.A. Bartlett Tree Expert Co.*, 316 NLRB at 1313. The closest Simon came to putting joint employer status at issue was in his May 22 letter to the Union, after the Union filed its unfair labor practice charge. Therein, Simon stated DirecTV had no control over the wages paid to DirectSat employees or the metrics used to evaluate the performance of unit employees. Simon also stated that DirecTV had no role in the negotiations and could not require that the Respondent seek its approval to enter into a collective bargaining agreement. However, these statements all came after the Union submitted its information requests for the full HSP agreement. Thus, those requests could not test the accuracy of claims that had not yet been made. In sum, the Respondent never denied that it and DirecTV were joint employers. It also did not deny any of the specific factors used to evaluate joint employer status. Therefore, the Union cannot establish the relevance of the full, unredacted HSP agreement on this basis either.

However, the Union is entitled to verify the Respondent's repeated claim that it furnished all the relevant portions of the HSP agreement on the scope-of-unit-work issue. First, no question exists, and the Respondent concedes, that information in the HSP agreement on the scope of unit work is relevant to the Union's representational functions.[21] This conclusion is supported by the stipulated facts. The dispute over the HSP agreement only arose because the Respondent itself included a reference to the agreement in its November 23, 2015 scope-of-unit-work bargaining proposal. The Respondent thereby put into play what services it furnished to DirecTV pursuant to the agreement. The Company was seeking in bargaining to classify any work performed outside of the agreement as nonbargaining unit work. The Union certainly is entitled to know the universe of bargaining unit work as defined in the agreement, in evaluating the Respondent's proposal. Moreover, the Respondent repeatedly told the Union it had provided all relevant parts of the HSP agreement in this regard. In its initial, three-page response dated December 4, 2015, the Respondent provided only a portion of the agreement it alone deemed "relevant to scope of work." Thereafter, on March 16, the Union asked for a full copy of the HSP agreement and reiterated that the Respondent referenced the agreement in its new product lines proposal. At the bargaining session on March 22, Simon again stated the Company already had provided all the relevant portions of the agreement. The Union then resubmitted its request for the full agreement on both April 5 and May 19.

Thus, the question presented is whether the Respondent unilaterally could decide what portions of the HSP agreement were relevant, only turn over those portions, and then refuse to provide the remainder of the agreement when the Union requested it. Board precedent is clear that the Respondent was not entitled to do so. In this regard, the factual situation here is similar to that in *Piggly Wiggly*, supra. In that case, a union requested sales and franchise agreements from an employer, whom it suspected had an alter-ego relationship with certain franchisees. The employer argued, in part, that the requested information was unnecessary, because its attorney had provided one paragraph of an agreement to the union and later told the union that the documents requested contained no other relevant information. The judge rejected the employer's argument that the response was sufficient and it did not have to provide the full agreements. The judge stated: "The [u]nion is not required to take the [employer's] word for it, but has the right to assess and verify for itself the accuracy of the [employer's] claims in bargaining." The Board adopted the judge's conclusion that the employer violated the Act, by delaying in providing the agreements. See also *Knappton Maritime Corp.*, 292 NLRB at 239–240 (providing an excised copy of a sales agreement, but not the full, original copy, violated the Act); *Southern Ohio Coal Co.*, 315 NLRB 836, 844–845 (1994) (an employer telling a union its version of what was in, and not in, a sales agreement did not satisfy the union's right to have access to an unexcised copy of that agreement).

Furthermore, the Union's inability to identify other specific relevant information in the HSP agreement cannot be held against it, since it has never seen the agreement. *Olean General Hospital*, 363 NLRB No. 62, slip op. at 7 (2015). In *Olean General*, a union requested a copy of a patient care survey conducted by a third party. Staffing had been an issue in contract negotiations. The Union wanted to determine if staffing was addressed in the report, even though it had no knowledge the survey contained such information. The Board rejected the employer's claim that the union failed to demonstrate a specific need for the patient care survey. The Board noted that, since the employer had seen the report and knew what was in it, the employer had ample opportunity to show that the information in it would be of no benefit to the union. The same principle applies in this case. Although it did provide a partial response to the Union, the Respondent never made an attempt to show the Union that the remainder of the HSP agreement lacked information relevant to the scope of unit work.

Finally, the Respondent contends the Union never objected to its providing only three pages of the HSP agreement. It is true that the Union never stated the partial response was inadequate. It also did not provide much in the way of an explanation as to why it needed the full HSP agreement. Nonetheless, what the Union did do was submit a request for the full agreement, on three occasions, after receiving the Company's initial response. The Union's conclusion that the initial response was not sufficient obviously can be inferred from its subsequent requests for the full agreement.

For all these reasons, I conclude that relevance is established here, because the Union is entitled to verify the Respondent's claim that it has provided all portions of the HSP agreement relevant to the scope of unit work. By failing to provide the full, unredacted HSP agreement, the Respondent violated Sec-

[21] R. Br., p. 10, fn. 5.

tion 8(a)(5).[22]

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide the Union with information it requested on March 18 and May 19, 2016, specifically a full, unredacted copy of the Home Service Provider agreement between the Respondent and DirecTV. The HSP agreement is necessary and relevant to the Union's performance of its duties as the collective-bargaining representative of unit employees.[23]

4. The above unfair labor practice affects commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, the Respondent must cease and desist from refusing to provide the Union with requested information that is necessary and relevant to the performance of its duties as the exclusive collective-bargaining representative of the Respondent's installation and service technicians. The Respondent also must provide the Union with a full, unredacted copy of the HSP agreement.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[24]

ORDER

The Respondent, DirectSat USA, LLC, South Holland, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively with the International Brotherhood of Electrical Workers, Local Union 21, AFL–CIO, by failing to provide information requested by the Union that is necessary and relevant for the Union's performance of its duties as the collective-bargaining representative of the employees in the Unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days, provide the Union with a full, unredact-

[22] The General Counsel did not advance the legal theory upon which I am finding a violation. Nonetheless, under the circumstances of this case, I find it appropriate to exercise my discretion in this manner. See, e.g., *Local 58, International Brotherhood of Electrical Workers (Paramount Industries, Inc.)*, 365 NLRB No. 30, slip op. at 4 fn. 17 (2017) (where the violation was alleged in the complaint, the factual basis for the violation was clear from the record, the law was well established, and no due process concerns were implicated, the Board found a violation on a different legal theory than that pursued by the General Counsel); *Riverside Produce Co.*, 242 NLRB 615, 615 fn. 2 (1979) (where the allegations were generally encompassed in the complaint, the issues were fully litigated, and the record fully supported the conclusions, the Board approved of a judge's finding of violations not specifically alleged in the complaint). Because this case was submitted pursuant to a stipulated record, no factual disputes exist. The complaint contained an allegation of unlawful conduct by the Respondent, specifically its refusal to provide the Union with a full copy of the HSP agreement. The parties similarly agreed that the issue in this case was "Whether the Respondent has violated Section 8(a)(5) of the Act by failing and refusing to provide the Union with a full unredacted copy of the [HSP agreement] between DirecTV and DirectSat." (Stipulation of facts, p. 2.) The complaint allegation and statement of the issue are sufficiently broad to encompass this legal theory. As a result, the Respondent has not been denied due process. Indeed, the Respondent addressed this theory in its brief. It repeatedly argued that the Union did not object to its initial response. In doing so, the Respondent advanced the contention that its initial response was adequate under the law. Finally, the stipulated facts fully support finding a violation on this basis.

[23] After the parties submitted their briefs, the Respondent filed a motion to strike portions of the Union's brief, because they were not a part of the stipulated record. The first section at issue is entitled: "The Possible Joint Employer Status of DirectSat and DirecTV." In this section, the Union contends that, during the time period when it requested the full HSP agreement, it became aware that the issue of whether the Respondent and DirecTV were joint employers was being litigated in a Fair Labor Standards Act case in Federal court. However, this fact is not in the stipulated record. Thus, I agree with the Respondent that, in this regard, the Union is inappropriately seeking to introduce new facts that are not properly before me for consideration. The Union also attached a decision of the Fourth Circuit Court of Appeals from January 2017, well after the material dates in this case, concerning the joint employer status of the two companies. The Union requested that I take judicial notice of the decision, as well as the Union's reliance on the decision as part of the reason for its information request. Of course, a judge can take judicial notice of an appellate court's decision on a material legal issue. But the Union's claimed reliance on this decision is a factual, not a legal, matter. Any such reliance to substantiate its information request had to be presented either at the time the request was made or in the stipulated factual record. Neither occurred. Thus, I grant the Respondent's motion to strike this portion of the Union's brief and have not considered that section in reaching this conclusion of law.

The second brief section at issue is entitled: "How A Technician's Earnings Are Determined." Therein, the Union addresses the concurrent information requests it submitted to the Respondent concerning DirecTV's performance standards, as well as the technicians' scorecards and performance metrics. Contrary to the Respondent's contention, the stipulated record does contain facts regarding the performance standards information requests. (Stipulation of facts, par. 28; Jt. Exh. 19.) Thus, I deny the Respondent's motion to strike this section. Nonetheless, as previously discussed, the General Counsel's complaint in this case alleges only the Respondent's failure to provide the full HSP agreement, not any information concerning performance standards. The General Counsel's brief contains no argument concerning performance standards, including their relation, if any, to the requests for the full HSP agreement. That issue simply is not before me. Accordingly, I find the Union's performance standards argument has no bearing on the complaint allegation here and I do not rely upon that section of the Union's brief in reaching this conclusion of law.

[24] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ed copy of the Home Service Provider agreement between the Respondent and DirecTV.

(b) Within 14 days after service by the Region, post at its facility in South Holland, Illinois, copies of the attached notice marked "Appendix."[25] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 days in conspicuous places including all places were notices to employees are customarily posted. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 18, 2016.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C., July 20, 2017.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain in good faith with the International Brotherhood of Electrical Workers, Local Union 21, AFL-CIO (the Union), by failing to provide the Union with information that is necessary and relevant to the performance of its duties as the exclusive collective-bargaining representative of employees in the following, appropriate bargaining unit:

> All full-time and regular part-time Installation/Service Technicians employed by the Employer at its facility located in South Holland, Illinois, but excluding all other employees, confidential employees, guards, and supervisors as defined in the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of this order, provide the Union with a full, unredacted copy of the Home Service Provider agreement between us and DirecTV. The Union requested this information on March 18 and May 19, 2016 and the information is relevant to the Union's duties as your collective-bargaining representative.

DIRECTSAT USA, LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/13-CA-176621 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

[25] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIRECTSAT USA, LLC, Employer *and* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 21, AFL-CIO, Union *and* DIRECTV, LLC Intervenor	CASE NO. 13-CA-176621

DIRECTV, LLC'S MOTION TO INTERVENE, RE-OPEN THE RECORD AND FOR RECONSIDERATION

Pursuant to Section 102.29 of the Board's Rules and Regulations, DIRECTV, LLC, ("DIRECTV") moves to intervene in the above-captioned case, requests that the Board re-open the record and requests that the Board reconsider its decision issued March 20, 2017, in *DirectSat USA, LLC*, 366 NLRB No. 40.[1]

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

DIRECTV provides broadcast satellite television services to consumers in the United

[1] DIRECTV contacted each of the parties regarding this motion. Counsel for Respondent DirectSat USA, LLC does not oppose this motion, Counsel for the General Counsel opposes this motion, and Counsel for Charging Party International Brotherhood of Electrical Workers, Local Union 21, AFL-CIO, responded to DIRECTV that he would check with the Union regarding its position.

States. (Sellers Dec., ¶ 3.)[2] It is wholly owned by AT&T, Inc. (*Id.*) DIRECTV is a party to a Home Service Provider ("HSP") agreement with DirectSat USA, LLC ("DirectSat")—the employer in the above-captioned case—through which DirectSat provides installation and repair services to DIRECTV subscribers. (*Id.*)

A. Proceedings Below.

On February 11, 2014, International Brotherhood of Electrical Workers Local 21 ("Union") was certified as the bargaining representative of some of DirectSat's employees in Mokena, Illinois.[3] Thereafter, DirectSat began bargaining with the Union. During the course of bargaining, the Union requested that DirectSat provide a copy of the HSP agreement between DirectSat and DIRECTV to the Union. DirectSat provided what it believed to be the relevant portions of the agreement but refused to provide other portions. Thereafter, the Union filed an unfair labor practice charge alleging that DirectSat violated section 8(a)(5) of the Act by failing to provide the entire, un-redacted HSP agreement.

The General Counsel contended that the Union needed to review the full, unredacted HSP agreement between DirectSat and DIRECTV "in order to determine whether those entities were joint employers for the purposes of collective bargaining, or alternately to verify [DirectSat's] claims about the nature of their relationship." *DirectSat, LLC*, 366 NLRB No. 40, slip op. at 1 (March 20, 2018). The ALJ rejected both of these arguments but found that the Union was entitled to see the full HSP "to verify [DirectSat's] claim that it had furnished all portions of that document relative to the scope of bargaining-unit work." *Id.* DirectSat filed exceptions to the ALJ's decision, but the Board affirmed the decision on another basis, namely that the HSP is

[2] Attached hereto as Exhibit A is the declaration of Jon Sellers, Assistant Vice President – Network Services ("Sellers Dec."), who is familiar with the HSP agreement.

[3] The facts of this case are set forth in the ALJ's decision. *DirectSat USA, LLC*, 366 NLRB No. 40, slip op. at 3-5 (March 20, 2018).

relevant to negotiations because DirectSat's proposal regarding new product lines amounted to having the scope of bargaining-unit work defined by the HSP. *Id*. at 2.

B. The HSP Agreement Contains DIRECTV's Confidential and Proprietary Information.

Critically, in reaching its conclusion, the Board observed that DirectSat did not object to disclosing the full HSP agreement on the grounds that doing so could reveal confidential, proprietary or trade-secret information. *Id*. at 2, n.4.[4] Regardless of whether the HSP agreement contains DirectSat's confidential and proprietary information, it contains DIRECTV's confidential and proprietary information. The HSP agreement contains non-public information about DIRECTV's pricing, commission rates, service territories, service and installation processes, quality standards, sales processes, and incentive structure, as well as links to internal documents, all of which if disclosed could provide an advantage to DIRECTV's competitors. (Sellers Dec., ¶ 4.) For this reason, DIRECTV views multiple terms and provisions of HSP agreement as confidential and proprietary. (*Id*.) Indeed, the bottom of each page of the HSP agreement states:

> **Proprietary and Confidential**
> This Agreement and Information contained therein is not for use or disclosure outside of AT&T, its Affiliates, and third party representatives, and Contractor except under written agreement by the contracting parties.

(*Id*.) Thus, DirectSat may not disclose the HSP agreement or the information it contains without DIRECTV's consent. (*Id*.) Moreover, Section 3.14(d) of the HSP agreement states:

> If a receiving Party is required to provide Information of a disclosing Party to any court or government agency pursuant to a written court order, subpoena, regulatory demand, request under the National Labor Relations Act (an "NLRA Request"), or process of law, the

[4] Specifically, the Board stated, "We further note that the Respondent did not, at any point, object to disclosing the full HSP on grounds that doing so could reveal information of a confidential, proprietary, or trade-secret nature. In addition, Member Emanuel observes that the Respondent did not assert a confidentiality interest in its exceptions." *Id*. at 2, n.4.

> receiving Party must, unless prohibited by applicable law, first provide the disclosing Party with prompt written notice of such requirement and reasonable cooperation to the disclosing Party should it seek protective arrangements for the production of such Information. The receiving Party will (i) take reasonable steps to limit any such provision of Information to the specific Information required by such court or agency, and (ii) continue to otherwise protect all Information disclosed in response to such order, subpoena, regulation, NLRA Request, or process of law.

(*Id*. at ¶ 5.)

Further, under Section 3.36(c)(x), it would be a non-curable breach of the agreement for DirectSat to fail to meet its obligations regarding the use or disclosure of DIRECTV's confidential information. (*Id*. at ¶ 6.) In short, the HSP agreement contains DIRECTV's confidential and proprietary information, and its terms require such information to be protected from disclosure.

C. DIRECTV Did Not Receive Notice of the Potential Disclosure of Its Confidential Information Until After the Board Issued Its Order.

In November 2016, DIRECTV had discussions with DirectSat about producing a redacted copy of the HSP agreement to the Union, which DIRECTV believed arose in the context of DirectSat's negotiations with the Union. (*Id*. at ¶ 7.) DIRECTV did not hear anything further from DirectSat on the issue after those discussions, and, until recently, believed the issue had been resolved. (*Id*.) Indeed, DIRECTV had no knowledge of this case, or the proceedings before the ALJ and the Board until DirectSat informed DIRECTV of the Board's March 20, 2018 decision. (*Id*.) Therefore, DIRECTV has had no opportunity to protect its confidential information. Accordingly, DIRECTV now files this motion. Moreover, DIRECTV's request to reopen the record and for the Board to reconsider its decision is timely, because it is being filed within 28 days of the Board's March 20 decision and order, and before this matter has been transferred to a court of appeals. *See* R&R § 102.48(c)(2).

II. ARGUMENTS AND AUTHORITIES

There is good cause to grant DIRECTV's Motion to Intervene, Reopen the Record and for Reconsideration of the Board's decision for several reasons.

First, although allowing intervention is discretionary with the Board, 29 U.S.C. § 160(b), third parties are routinely allowed to intervene in judicial proceedings to protect their confidential and proprietary information under Federal Rule of Civil Procedure 24. *See e.g.*, *Formulabs, Inc. v. Hartley Pen Co*., 275 F.2d 52, 56-57 (9th Cir. 1960) (trade secret licensor has right to intervene where its trade secrets may be disclosed in the pending litigation); *FTC v. Advocate Health Care Network*, 162 F. Supp. 3d 666, 673-74 (N.D. Ill. 2016) (granting motions to amend confidentiality order by intervenors, *i.e.*, the third parties who "lined up to intervene in this matter and protect their confidential information from defendants' perusal"); *J.D. Fields & Co., Inc. v. Nucor Yamamoto Steel Co*., No. 4:12-cv-00754-KGB, 2015 WL 12696208, *4 (E.D. Ark. June 15, 2015) (granting non-party's motion to intervene for the limited purpose of protecting its confidential pricing information); *Shire Dev. LLC v. Mylan Pharm., Inc*., No. 8:12-CV-1190-T-30AEP, 2013 WL 6858319, *1 (M.D. Fla. Dec. 30, 2013) (finding that non-parties' interest in protecting disclosure of their confidential, proprietary business information is sufficient to justify intervention under Rule 24); *Thurmond v. Compaq Computer Corp*., No. 1:99-CV-711, 2000 U.S. Dist. LEXIS 20893, *9 (E.D. Tex. June 26, 2000) (granting non-party's motion to intervene to the extent necessary to argue its motion for protective order to protect its confidential information); *Patt v. Family Health Sys., Inc*., 189 F.R.D. 518, 520 (E.D. Wis. 1999) (noting that doctor was granted leave to intervene in motion for a protective order to prevent disclosure of confidential information); *Nelson v. Greenspoon*, 103 F.R.D. 118 (S.D.N.Y. 1984) (granting third party's motion to intervene to protect potentially privileged documents, but finding the documents themselves not privileged); *Int'l Truck & Engine Corp. v. Caterpillar,*

Inc., 814 N.E. 2d 182 (Ill. App. 2004) (noting that in the underlying case, the court granted non-party's petition to intervene and request protective order to prevent plaintiff from disclosing confidential information in lawsuit).

Courts have found that a non-party seeking to protect its confidential information has a recognized interest in the underlying action, which may be impaired absent intervention. *See e.g.*, *J.D. Fields*, 2015 WL 12696208, at *3. Moreover, as seen in this case, having an aligned interest with one of the parties does not mean that the non-party's interest will be adequately represented. *Id*. at *4.

Second, the Board has repeatedly recognized the need to balance employers' legitimate confidentiality interests with unions' need for information. *See e.g.*, *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979); *Detroit Newspaper Agency*, 317 NLRB 1071 (1995). Therefore, when an employer asserts a confidentiality interest, the employer and the union must seek a mutually acceptable accommodation of their respective interests. *Detroit Newspaper Agency*, 317 NLRB at 1072. These principles should apply with equal weight to situations involving the confidential information of a third party. *See U.S. Postal Service*, 364 NLRB No. 27, slip op. at 3 (2016) (Member Miscimarra noting that the majority's decision to order the immediate, un-redacted production of requested documents gave no consideration to the confidentiality interests of "an innocent third party," whose business interests also deserved protection). Here, unless DIRECTV is permitted to intervene, it will have no opportunity to assert its confidentiality interest or attempt to find a mutually acceptable approach that will accommodate its interest and the obligations and needs of the parties.

Third, DIRECTV will present evidence regarding the HSP agreement and the confidential and proprietary nature of DIRECTV's information contained therein, which is

evidence that has not been previously presented. The Board noted that DirectSat raised no issue regarding the confidential nature of the HSP agreement. *DirectSat, LLC*, 366 NLRB No. 40, slip op. at 2, n.4. DIRECTV seeks to intervene to protect its own confidential information, not DirectSat's confidential information. Because the confidential and proprietary nature of the HSP agreement as to DIRECTV has not been presented in these proceedings, it is thus information not previously available to or considered by the ALJ or the Board.

Fourth, failure to allow DIRECTV to intervene and protect its confidential information will leave DIRECTV vulnerable and without a meaningful remedy. Although DirectSat failed to assert a confidentiality argument, it is DIRECTV that will be harmed when its confidential information is disclosed if the Board's order is ultimately enforced by a court or complied with by DirectSat. Thus, DIRECTV should be allowed to intervene and present the necessary evidence so the Board can adequately assess DIRECTV's interests in reconsidering this case. The normal course in judicial proceedings is to allow a third party to intervene to protect its confidential information. *See e.g.*, *Advocate Health Care Network*, 162 F. Supp. 3d at 673-74 (granting motions to amend confidentiality order by intervenors, *i.e.*, the third parties who "lined up to intervene in this matter and protect their confidential information from defendants' perusal"); *Thurmond*, 2000 U.S. Dist LEXIS 20893, at *9 (granting non-party's motion to intervene to the extent necessary to argue its motion for protective order to protect its confidential information).

Finally, DIRECTV's Motion is timely. There is no time limit in section 10(b) as to when a motion to intervene must be filed. 29 U.S.C. § 160(b). DIRECTV was not aware of the risk that its confidential information may be disclosed until DirectSat informed DIRECTV of the Board's decision and order. And DIRECTV has promptly taken action upon its receipt of this

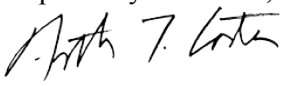
information. The Board's rules state that motions for reconsideration must be filed within 28 days of the order at issue, and thus, this motion is filed within 28 days of the Board's March 20 order. *See* R&R § 102.48(c)(2).

III. CONCLUSION

In conclusion, the Board's decision and order in this case requires DirectSat to disclose DIRECTV's confidential and proprietary information without adequately protecting DIRECTV's interests. As soon as DIRECTV learned of the Board's decision and order, it took steps to request intervention and an opportunity to present evidence of its confidentiality interests so the Board can consider those interests in deciding this case. Therefore, DIRECTV respectfully requests that the Board grant this motion, allow DIRECTV to intervene in these proceedings, re-open the record so DIRECTV can present evidence of the confidential and propriety nature of the HSP contract, and reconsider this case, given that new information. DIRECTV further requests that the Board grant DIRECTV any other relief, legal or equitable, to which it is entitled.

Dated: April 4, 2018

Respectfully submitted,



ARTHUR T. CARTER
ARRISSA K. MEYER
LITTLER MENDELSON, P.C.
2001 Ross Avenue, Suite 1500
Dallas, Texas 75201-2931
Telephone: (214) 880-8105
Facsimile: (214) 594-8601
atcarter@littler.com
akmeyer@littler.com

A. JOHN HARPER III
LITTLER MENDELSON, P.C.
1301 McKinney St.
Houston, Texas 77010
Telephone: (713) 652-4750
Facsimile: (713) 513-5978
ajharper@littler.com

STEPHEN J. SFERRA
LITTLER MENDELSON, P.C.
1100 Superior Avenue, 20th Floor
Cleveland, Ohio 44114
Telephone: (216) 623-6089
Facsimile: (216) 549-0538
ssferra@littler.com

Attorneys for Intervenor
DIRECTV, LLC

CERTIFICATE OF SERVICE

The undersigned affirms that on April 4, 2018, the foregoing Motion to Intervene, Re-Open the Record and For Reconsideration was filed with the National Labor Relations Board using the e-filing system at www.nlrb.gov, and that copies were served on the following individuals by electronic mail and FedEx Delivery:

Elizabeth Cortez, Esq.
Counsel for the General Counsel
National Labor Relations Board, Region 13
219 S. Dearborn St., Suite 808
Chicago, IL 60604
Elizabeth.Cortez@nlrb.gov

Gilbert A. Cornfield, Esq.
Cornfield and Feldman, LLP
25 East Washington Street, Suite 1400
Chicago, IL 60602-1708
GCornfield@cornfieldandfeldman.com

Eric P. Simon
Douglas J. Klein
Jackson Lewis P.C.
666 Third Avenue, 29th Floor
New York, New York 10017
Douglas.Klein@jacksonlewis.com

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIRECTSAT USA, LLC, Employer *and* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 21, AFL-CIO, Union *and* DIRECTV, LLC Intervenor	CASE NO. 13-CA-176621

DECLARATION OF JOHN SELLERS

I, John Sellers, declare as follows:

1. I am over the age of eighteen (18) and am competent to testify to the matters contained herein. This declaration is based upon my personal knowledge.

2. I am currently employed by AT&T, Inc. as the Assistant Vice President – Network Services. I have held this position or a substantially-similar one since 2012. In this position, I am responsible for managing Intervenor DIRECTV, LLC's ("DIRECTV") Home Service Provider ("HSP") agreement with DirectSat USA, LLC ("DirectSat") - the employer in the above-captioned case.

3. DIRECTV provides broadcast satellite television services to consumers in the United States. It is wholly owned by AT&T, Inc. Under the HSP agreement, DirectSat employees provide installation and repair services to DIRECTV subscribers.

4. The HSP agreement contains multiple terms and provisions that DIRECTV views as confidential and proprietary, including DIRECTV's pricing, commission rates, service territories, service and installation processes, quality standards, sales processes, and incentive structure, as well as links to internal documents. The bottom of each page of the HSP agreement states:

> **Proprietary and Confidential**
> This Agreement and Information contained therein is not for use or disclosure outside of AT&T, its Affiliates, and third party representatives, and Contractor except under written agreement by the contracting parties.

Thus, DirectSat may not disclose the HSP agreement or the information it contains without DIRECTV's consent.

5. The HSP specifically establishes a procedure for handling court or government agency directives to disclose confidential information provided pursuant to the agreement. Section 3.14(d) of the HSP agreement states:

> If a receiving Party is required to provide Information of a disclosing Party to any court or government agency pursuant to a written court order, subpoena, regulatory demand, request under the National Labor Relations Act (an "NLRA Request"), or process of law, the receiving Party must, unless prohibited by applicable law, first provide the disclosing Party with prompt written notice of such requirement and reasonable cooperation to the disclosing Party should it seek protective arrangements for the production of such Information. The receiving Party will (i) take reasonable steps to limit any such provision of Information to the specific Information required by such court or agency, and (ii) continue to otherwise protect all Information disclosed in response to such order, subpoena, regulation, NLRA Request, or process of law.

6. Further, under Section 3.36(c)(x), it would be a non-curable breach of the agreement for DirectSat to fail to meet its obligations regarding the use or disclosure of DIRECTV's confidential information.

7. In November 2016, DIRECTV had discussions with DirectSat about producing a redacted copy of the HSP agreement to the International Brotherhood of Electrical Workers

Local 21 ("Union"), which DIRECTV believed arose in the context of DirectSat's negotiations with the Union. DIRECTV did not hear anything further from DirectSat on the issue after those discussions, and, until recently, believed the issue had been resolved. DIRECTV did not receive formal notice of this case as required under the HSP and had no knowledge of it, or the proceedings before the Administrative Law Judge and National Labor Relations Board ("Board"), until DirectSat informed DIRECTV of the Board's March 20, 2018 decision.

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct and this this declaration was executed on April 4, 2018.

John Sellers
Assistant Vice President – Network Services
AT&T, Inc.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIRECTSAT USA, LLC,

Respondent

and Case 13-CA-176621

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 21, AFL-CIO,

Union

JOINT RESPONSE IN OPPOSITION TO DIRECTV, LLC MOTION TO INTERVENE, RE-OPEN THE RECORD AND FOR RECONSIDERATION

On March 20, 2018, the Board affirmed the Administrative Law Judge's rulings, findings, and conclusions that DirectSat USA, LLC (Respondent) violated Section 8(a)(5) of the Act. On April 4, 2018, DIRECTV, LLC, (hereafter "DIRECTV") moved pursuant to Section 102.29 of the NLRB Rules and Regulations to Intervene, Re-Open the Record, and for Reconsideration by the Board. DIRECTV's Motion must be denied in its entirety.

Regarding its Motion to Intervene, Section 102.29 of the NLRB's Rules and Regulations makes no provision for DIRECTV to intervene at this late stage of the proceedings. Specifically, Section 102.29 of the Board's Rules and Regulations, states in pertinent part:

> Any person desiring to intervene in any proceeding shall file a motion in writing . . . stating the grounds upon which such person claims an interest. Prior to the hearing, such a motion shall be filed with the Regional Director issuing the complaint . . .The Regional Director shall rule upon all such motions filed prior to the hearing, and shall cause a copy of said rulings to be served on the other parties, or may refer the motion to the administrative law judge for ruling . . . The Regional Director or the administrative law judge, as the case may be, may by order permit intervention in person or by counsel or other representative to such extent and upon such terms as he may deem proper.

Nor do any other provisions of the NLRB's Rules and Regulations provide for intervention of a party after both the Administrative Law Judge and the Board have issued their decisions. Accordingly, DIRECTV's motion to intervene must be denied.

Because DIRECTV is not a party to this proceeding, its arguments regarding reconsideration and re-opening the record must also fail inasmuch as NLRB Rules and Regulations apply only to parties to a proceeding. (See Rules and Regulations Sec. 102.48)

However, under the Federal Rules of Civil Procedure, when a movant has no right to intervention, a judge has the discretion to grant permissive intervention where the movant "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b). In assessing whether to grant permissive intervention, the judge may consider a variety of factors, including:

> the nature and extent of the intervenors' interest, their standing to raise relevant legal issues, . . . whether the intervenors' interests are adequately represented by other parties, ...and whether the parties seeking intervention will significantly contribute the full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented.

Spangler v. Pasadena City Bd. of Ed., 552 F.2d 1326, 1329 (9th Cir. 1977) (footnotes omitted). There is a presumption of adequacy of representation when the movant has the same ultimate objective as an existing party. *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1305 (9th Cir. 1997). In this case, DIRECTV's interests were aligned with those of Respondent DirectSat. It is clear that Respondent DirectSat had a full opportunity to argue its position, including raising any confidentiality and proprietary concerns that existed by virtue of its written agreements with DIRECTV, through the proceedings before the Administrative Law Judge and once again before the Board. Permissive intervention is neither necessary, nor appropriate inasmuch as the record before both the Administrative Law Judge and Board was developed and

adjudicated in full.

Moreover, the federal rules specifically require that, "[i]n exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Counsel for the General Counsel notes that there is "a strong policy favoring an end to litigation." *R.L. Polk & Co.*, 313 NLRB 1069, 1071 and n.11 (1994). In this case, allowing DIRECTV to reopen the record would further delay the effectuation of the Board's order requiring Respondent to provide a full unredacted copy of the HSP agreement.

Even assuming DIRECTV was a party to the proceeding, which it is not, the Board's Rules and Regulations permit re-opening of an administrative record only under extraordinary circumstances not present here. Thus, DIRECTV must demonstrate that the evidence it wishes to proffer is "newly discovered" within the meaning of § 102.48(d)(1) of the Board's Rules and Regulations. The Board has explicitly and consistently held that "[n]ewly discovered evidence is evidence which was in existence at the time of the hearing which could not be discovered by reasonable due diligence" *APL Logistics, Inc.*, 341 NLRB 994 (2004). See also *Machinists Lodge 91 (United Technologies)*, 298 NLRB 325, n. 1 (1990), enfd., 934 F.2d 1288 (2d Cir. 1991); *Fitel/Lucent Technologies*, 326 NLRB 46, n.1 (1998); *Allis-Chalmers, Corp.*, 286 NLRB 219, n. 1 (1987); *A.N. Electric Corp.*, 276 NLRB 887, n. 1 (1985); *Lincoln Hills Nursing Home, Inc.*, 266 NLRB 740, n. 1(1983); *Owen Lee Floor Service*, 250 NLRB 651, n. 2 (1980) (When a party seeks to introduce evidence after the close of an unfair labor practice hearing that it did not introduce during the hearing, a party must prove that it acted with "the diligence required to establish that it was excusably ignorant" of the existence of the new evidence. *Fitel/Lucent Technologies, Inc.*, 326 NLRB 46, 46 at fn. 1 (1998).)

Here, DIRECTV is seeking to introduce evidence regarding the HSP agreement and the

purported confidential and proprietary nature of information contained therein as a reason to prevent compliance with the Board Order. This argument does not qualify as newly discovered evidence . By their own admission, DIRECTV in its Motion unequivocally states that in November 2016, it had discussions with Respondent DirectSat about producing a redacted copy of the HSP agreement to the Union. (DIRECTV's Motion, p. 4). DIRECTV failed to exercise due diligence with regard to the outcome of this issue by engaging in any type of follow up as to the resolution of the matter with DirectSat. DIRECTV's admitted failure to exercise due diligence in the first instance is not a proper basis to allow it to charge in at this late stage of the proceedings and re-open the record.

Finally, even assuming DIRECTV was a party to these proceedings and could properly bring these motions, to prevail in its request for reconsideration, DIRECTV must also show that consideration of any additional evidence it sought to provide would require a different result than what has been ordered by the Board. DIRECTV has not made the required showing.

In the instant case, the Board noted that although Respondent DirectSat did provide a partial response to the Union, the Respondent never made an attempt to show the Union that the remainder of the HSP agreement lacked information relevant to the scope of unit work. *DirectSat USA, LLC* 366 NLRB No. 40 (2018). DIRECTV's Motion for reconsideration and to reopen this case would not change the results of the Board decision inasmuch as it would not address Respondent's unlawful failure to demonstrate to the Union that those portions of the HSP agreement it refused to provide lacked information relevant to the scope of unit work.

For the above reasons, Counsel for the General Counsel and the Union ask that DIRECTV's Motion be denied in its entirety.

Dated: April 19, 2018

/s/ Elizabeth S. Cortez
Elizabeth S. Cortez
Counsel for the General Counsel
National Labor Relations Board, Region 13
219 S. Dearborn St., Suite 808
Chicago, IL 60604
Elizabeth.Cortez@nlrb.gov

/s/ Gilbert Cornfield
Gilbert Cornfield**,** Attorney
CORNFIELD AND FELDMAN LLP
25 E. Washington Street., Suite 1400
Chicago, IL 60602
GCornfield@cornfieldandfeldman.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Joint Response in Opposition to DIRECTV, LLC Motion to Intervene, Re-Open the Record and for Reconsideration were electronically filed with the National Labor Relations Board on this 19th day of April 2018, and true and correct copies of the document have been served on the parties in the manner indicated below on the same date.

Via Electronic Mail:

Douglas J. Klein, Attorney JACKSON LEWIS P.C. 666 Third Avenue New York, NY 10017 Email: kleind@jacksonlewis.com	**Arthur T. Carter,** Attorney **Arrissa K. Meyer,** Attorney LITTLER MENDELSON, P.C. 2001 Ross Avenue, Suite 1500 Dallas, Texas 75201-2931 Email: atcarter@littler.com Email: akmeyer@littler.com
Gilbert Cornfield, Attorney CORNFIELD AND FELDMAN LLP 25 East Washington Street Suite 1400 Chicago, IL 60602 Email: gcornfield@cornfieldandfeldman.com	**A. John Harper III,** Attorney LITTLER MENDELSON, P.C. 1301 McKinney St. Houston, Texas 77010 Email: ajharper@littler.com
	Stephen J. Sferra, Attorney LITTLER MENDELSON, P.C. 1100 Superior Avenue, 20th Floor Cleveland, Ohio 44114 Email: ssferra@littler.com

/s/ Elizabeth S. Cortez
Elizabeth S. Cortez
Counsel for the General Counsel
National Labor Relations Board
Region 13
219 South Dearborn Street, Suite 808
Chicago, Illinois 60604

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIRECTSAT USA, LLC, Employer *and* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 21, AFL-CIO, Union *and* DIRECTV, LLC Intervenor	CASE NO. 13-CA-176621

DIRECTV, LLC'S REPLY IN SUPPORT OF ITS MOTION TO INTERVENE, RE-OPEN THE RECORD AND FOR RECONSIDERATION

DIRECTV, LLC ("DIRECTV") filed its Motion to Intervene, Re-open the Record and for Reconsideration (the "Motion") on April 4, 2018. On April 19, 2018, Counsel for the General Counsel and the International Brotherhood of Electrical Workers, Local Union 21, AFL-CIO (the "Union") filed their Joint Response in Opposition to DIRECTV's Motion, asserting several arguments as to why DIRECTV's Motion should be denied. None of them are persuasive. DIRECTV now files this Reply.

I. THE BOARD'S RULES DO NOT PROHIBIT DIRECTV FROM INTERVENING AT THIS STAGE OF THE PROCEEDINGS.

Contrary to the Counsel for the General Counsel's and the Union's argument, Section 102.29 of the NLRB's Rules and Regulations does not foreclose DIRECTV's ability to intervene. There is no time-frame, whether permissive or restrictive, set forth in the Board's rules on intervention. Accordingly, this is no basis on which to deny DIRECTV's Motion.

II. DIRECTV AND DIRECTSAT HAVE SEPARATE INTERESTS.

Relying on the doctrine of permissive intervention, Counsel for the General Counsel and the Union further argue that DIRECTV's Motion should be denied because its interests are "aligned" with DirectSat's interests. Counsel for the General Counsel and the Union are incorrect for several reasons.

They first claim that DirectSat and DIRECTV have the same ultimate objective, so there is a "presumption" that DIRECTV's interests were adequately represented, which is one of the factors a judge may consider in evaluating a motion to intervene. Significantly, "Rule 24(b) does not list inadequacy of representation as one of the considerations for the court in exercising its discretion under Rule 24(b)", so "it is clearly a minor factor at most." *Allco Fin. Ltd. v. Etsy*, 300 F.R.D. 83, 88 (D. Conn. 2014); *see also South Dakota v. U.S. Dep't of Interior*, 317 F.3d 783, 787 (8th Cir. 2003) (noting that adequacy of representation "is only a minor variable in the Rule 24(b) decision calculus"). Accordingly, permissive intervention may be appropriate even where representation was adequate. *Allco Fin. Ltd*., 300 F.R.D. at 88.

Regardless, DIRECTV can satisfy the "minimal" burden of showing inadequate representation because courts have recognized that having an aligned interest with one of the parties does not mean that the non-party's interest in protecting its confidential information will be adequately represented. *See, e.g.*, *Gov't Accountability Project v. Food and Drug Admin*., 181 F. Supp. 3d 94, 96 (D.C. Cir. 2015) (explaining that in FOIA litigation, the government and intervenor may be partially aligned, but the government is interested in fulfilling its FOIA obligations, whereas the intervenor is interested in preventing disclosure of its confidential materials); *J.D. Fields & Co., Inc. v. Nucor Yamamoto Steel Co*., No. 4:12-cv-00754-KGB, 2015 WL 12696208, *4 (E.D. Ark. June 15, 2015) (although defendant and intervenor both opposed plaintiff's motion to compel, intervenor had better understanding of value of confidential

information and stronger motivation to protect its own confidential information); *Northrop Grumman Info. Tech., Inc. v. U.S.*, 74 Fed. Cl. 407, 420 (2006) ("[W]hile it is true that the government has a statutory duty not to release Lockheed's proprietary information…it may very well not vociferously protect Lockheed's secrets as Lockheed would"). In fact, DirectSat has not adequately represented DIRECTV's interests because at no point has DirectSat addressed or even asserted that the HSP contains DIRECTV's confidential information. *See DirectSat USA, LLC*, 366 NLRB No. 40, slip op. at 2, n.4 (March 20, 2018) (noting that DirectSat "did not, at any point, object to disclosing the full HSP on grounds that doing so could reveal information of a confidential, proprietary, or trade-secret nature").

Moreover, DIRECTV and DirectSat have different legal positions with respect to the HSP. DirectSat argued that the entire, un-redacted HSP was not relevant to the Union's role as bargaining agent for certain of its employees.[1] Regardless of the HSP's relevance, DIRECTV seeks to protect its confidential information contained in the HSP. Rather than seeking an order that the HSP need not be disclosed on relevance grounds, DIRECTV seeks an order allowing it to intervene to present evidence of its separate interests in the confidential and propriety nature of the HSP. Counsel for the General Counsel and the Union thus paint with too broad a brush in an effort to disguise the real differences between DIRECTV's and DirectSat's interests.

III. GRANTING DIRECTV'S MOTION WOULD NOT RESULT IN UNDUE DELAY.

Counsel for the General Counsel and the Union argue that granting DIRECTV's Motion would "further delay the effectuation of the Board's order requiring Respondent to provide a full un-redacted copy of the HSP agreement" and cite the Board's policy favoring an end to litigation

[1] DirectSat also argued that it was denied due process because the Administrative Law Judge decided the case on an unlitigated theory. DIRECTV need not and does not take any position on this argument.

in urging the Board to deny DIRECTV's Motion. *See* Response at 3 (citing Fed R. Civ. P. 24(b)(3) and *R.L. Polk & Co*., 313 NLRB 1069, 1071 & n.11 (1994)). As an initial matter, this is a policy that the Board itself has not followed. *See, e.g., NLRB v. Ancor Concepts*, 166 F.3d 55, 59 (2d Cir. 1999) (criticizing the Board for a 4 1/2 year delay in deciding a case).

Further, this case has been pending for almost two years as it is, and DirectSat has filed a Petition for Review of the Board's order in the United States Court of Appeals for the D.C. Circuit. *See* DirectSat's Petition for Review, Case No. 18-1092 (D.C. Cir. April 3, 2018). Thus, even absent DIRECTV's intervention, DirectSat would not be producing an un-redacted copy of the HSP to the Union anytime soon, so the risks of delay and prejudice caused by DIRECTV's intervention are minimal.

IV. DIRECTV WAS UNDER NO OBLIGATION TO MONITOR THE LITIGATION OF ITS SUBCONTRACTORS AS A PREREQUISITE TO INTERVENING IN THIS CASE.

Finally, Counsel for the General Counsel and the Union contend that because DIRECTV seeks to make arguments based on the HSP, and had discussions with DirectSat in November 2016 about redacting the HSP for production to the Union, there is no "new evidence" to be presented, and further, DIRECTV failed to exercise diligence by not following up with DirectSat as to the status of this matter. *See* Response at 3-4. This line of reasoning ignores the facts that no evidence or arguments were presented in this case about DIRECTV's confidentiality interests. This is a different issue than whether DirectSat proved that the portions of the HSP not produced "lacked information relevant to the scope of unit work." Response at 4 (quoting *DirectSat, USA, LLC* 366 NLRB No. 40 (March 20, 2018)). And had DIRECTV's confidentiality interests been presented, the Board's order could have been different—it could have ordered the parties to negotiate over a proper accommodation of those interests prior to production of the HSP. *See, e.g.*, *Metropolitan Edison Co*., 330 NLRB 107, 109 (1999) (appropriate remedy is to give parties

an opportunity to bargain over an accommodation); *Pennsylvania Power*, 301 NLRB 1104, 1108, n.18 (noting that "the Board's usual view [is] that parties should bargain over the disclosure of partially confidential information").

Counsel for the General Counsel and the Union also argue that DIRECTV "failed to exercise due diligence" because it did not "follow-up" with DirectSat about the resolution of this matter. Laying aside the implicit mischaracterization of DIRECTV's evidence in this regard,[2] there are two problems with this reasoning: First, as stated above, there is still no "resolution" to this matter because Board orders are not self-enforcing and DirectSat has appealed to the D.C. Circuit.

Second, and perhaps more importantly, requiring DIRECTV to "follow up" with DirectSat in order to prove its diligence places a nearly impossible burden on DIRECTV. In order to meet such a burden in this and future cases, DIRECTV would have to monitor the collective bargaining negotiations and litigation positions taken by each of its subcontractors and vendors, and the information produced in connection with same. Not only does such an argument re-write the HSP,[3] which contemplated DirectSat keeping DIRECTV informed rather than the other way around, but it shifts the burden of such diligence from the parties to the

[2] The attached Amended Declaration of John Sellers attests to DIRECTV's understanding that the November/December 2016 conversations with DirectSat were related to negotiations over production of the HSP to resolve an NLRB charge, not the pendency of litigation. Indeed, contrary to the assertions by Counsel for the General Counsel and the Union, DIRECTV had no knowledge of the status of this litigation in November 2016 or at any time prior to the Board's March 20, 2018 decision. As explained therein, DIRECTV submits the Amended Declaration of John Sellers to correct some minor inaccuracies in the original declaration.

[3] Just as the Board cannot rewrite parties' collective bargaining agreements or compel them to agree to certain terms, the Board also should not be able to rewrite the terms of a commercial contract involved in an NLRB proceeding. *Cf. H.K. Porter, Co. v. NLRB*, 397 U.S. 99, 108 (1970) (noting that one of the fundamental policies of the Act is freedom of contract and the Board has no authority to compel agreement or control contract terms); *Employing Lithographers of Greater Miami v. NLRB*, 301 F.2d 20, 28 (5th Cir. 1962) (stating that the court knows of no authority allowing the Board to rewrite contracts for the parties).

litigation to an innocent third party.

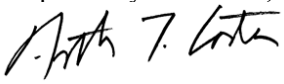
Further, contrary to Counsel for the General Counsel's and the Union's argument, DIRECTV engaged in an appropriate amount of due diligence given its limited knowledge by conferring with DirectSat about the need to redact certain provisions of the HSP to protect DIRECTV's confidential information and then relying on DirectSat—again, the party to the litigation and a party to the HSP—to make the necessary arguments. Thus, it is not any lack of due diligence by DIRECTV that made DIRECTV's Motion necessary.

V. CONCLUSION

DIRECTV respectfully requests that the Board grant its Motion, allow DIRECTV to intervene in these proceedings, re-open the record so DIRECTV can present evidence of the confidential and propriety nature of the HSP, and reconsider this case, given that new information. DIRECTV further requests that the Board grant DIRECTV any other relief, legal or equitable, to which it is entitled.

Dated: April 25, 2018

Respectfully submitted,



ARTHUR T. CARTER
Texas Bar No. 00792936
ARRISSA K. MEYER
Texas Bar No. 24060954
LITTLER MENDELSON, P.C.
2001 Ross Avenue, Suite 1500
Dallas, Texas 75201-2931
Telephone: (214) 880-8105
Facsimile: (214) 594-8601
atcarter@littler.com
akmeyer@littler.com

A. JOHN HARPER III
Texas Bar No. 24032392
LITTLER MENDELSON, P.C.
1301 McKinney St.
Houston, Texas 77010
Telephone: (713) 652-4750
Facsimile: (713) 513-5978
ajharper@littler.com

STEPHEN J. SFERRA
LITTLER MENDELSON, P.C.
Ohio Bar No. 0037286
1100 Superior Avenue, 20th Floor
Cleveland, Ohio 44114
Telephone: (216) 623-6089
Facsimile: (216) 549-0538
ssferra@littler.com

Attorneys for Intervenor
DIRECTV, LLC

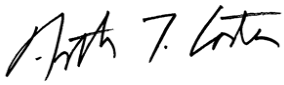
CERTIFICATE OF SERVICE

The undersigned affirms that on April 25, 2018, the foregoing Motion to Intervene, Re-Open the Record and For Reconsideration was filed with the National Labor Relations Board using the e-filing system at www.nlrb.gov, and that copies were served on the following individuals by electronic mail and FedEx Delivery:

Elizabeth Cortez, Esq.
Counsel for the General Counsel
National Labor Relations Board, Region 13
219 S. Dearborn St., Suite 808
Chicago, IL 60604
Elizabeth.Cortez@nlrb.gov

Gilbert A. Cornfield, Esq.
Cornfield and Feldman, LLP
25 East Washington Street, Suite 1400
Chicago, IL 60602-1708
GCornfield@cornfieldandfeldman.com

Eric P. Simon
Douglas J. Klein
Jackson Lewis P.C.
666 Third Avenue, 29th Floor
New York, New York 10017
SimonE@jacksonlewis.com
Douglas.Klein@jacksonlewis.com



ARTHUR T. CARTER

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIRECTSAT USA, LLC, Employer *and* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 21, AFL-CIO, Union *and* DIRECTV, LLC Intervenor	CASE NO. 13-CA-176621

AMENDED DECLARATION OF JOHN SELLERS

I, John Sellers, declare as follows:[1]

1. I am over the age of eighteen (18) and am competent to testify to the matters contained herein. This declaration is based upon my personal knowledge.

2. I am currently employed by AT&T, Inc. as the Assistant Vice President – Network Services. I have held this position or a substantially-similar one since 2012. In this position, I am responsible for managing Intervenor DIRECTV, LLC's ("DIRECTV") Home Service Provider ("HSP") agreement with DirectSat USA, LLC ("DirectSat") - the employer in the above-captioned case.

[1] In the Declaration of John Sellers attached to DIRECTV's motion, DIRECTV inadvertently referenced the wrong version of the HSP agreement. Although DIRECTV believes the differences in the two agreements' confidentiality provisions are not material, DIRECTV submits this Amended Declaration of John Sellers in the interest of accuracy. Paragraphs 4, 5, 6, and 7 have been revised.

3. DIRECTV provides broadcast satellite television services to consumers in the United States. It is wholly owned by AT&T, Inc. Under the HSP agreement, DirectSat employees provide installation and repair services to DIRECTV subscribers.

4. The HSP agreement contains multiple terms and provisions that DIRECTV views as confidential and proprietary, including DIRECTV's pricing, commission rates, service territories, service and installation processes, quality standards, sales processes, and incentive structure. Thus, Section 23(a) of the HSP agreement specifically defines "Confidential Information" to include "the terms of this Agreement." Section 23(b) prohibits DirectSat from using Confidential Information "for any reason whatsoever (other than to perform this Agreement)" and requires DirectSat to ensure that DIRECTV's Confidential Information is protected.

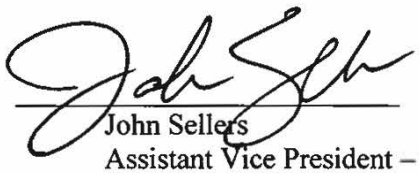
5. The HSP also references a procedure for handling court or government agency directives to disclose confidential information provided pursuant to the agreement. Section 23(d) of the HSP agreement provides that before disclosing any such confidential information pursuant to a government agency or court order, DirectSat must first "provide[] notice to DIRECTV prior to any such disclosure and use[] reasonable efforts to obtain confidential treatment for the information" to avoid violating its confidentiality obligations.

6. Further, under Section 8(c)(x), it would be a non-curable breach of the agreement for DirectSat to fail to meet its obligations regarding the use or disclosure of DIRECTV's confidential information.

7. In November/December 2016, DIRECTV had discussions with DirectSat about producing a redacted copy of the HSP agreement to the International Brotherhood of Electrical Workers Local 21 ("Union"), which DIRECTV believed arose in the context of DirectSat's

negotiations to resolve a National Labor Relations Board ("NLRB") charge. DIRECTV did not hear anything further from DirectSat on the issue after those discussions, and, until recently, believed the issue had been resolved. DIRECTV did not receive notice of this case as contemplated by the HSP and had no knowledge of the proceedings before the Administrative Law Judge and NLRB, until DirectSat informed DIRECTV of the Board's March 20, 2018 decision.

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct and this this declaration was executed on April 24, 2018.



John Sellers
Assistant Vice President – Network Services
AT&T, Inc.

DirectSat USA, LLC and International Brotherhood of Electrical Workers, Local Union 21, AFL–CIO. Case 13–CA–176621

July 25, 2018

ORDER DENYING MOTION

BY CHAIRMAN RING AND MEMBERS PEARCE AND MCFERRAN

On March 20, 2018, the Board issued its Decision and Order in this proceeding, in which it found that the Respondent, DirectSat USA, LLC, violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide the Charging Party Union with a full, unredacted copy of the Home Services Provider agreement (HSP) between the Respondent and DirecTV, LLC. *DirectSat USA, LLC*, 366 NLRB No. 40 (2018). On April 4, 2018, DirecTV, LLC (DirecTV), which is not a party to this proceeding, filed a motion to intervene, to reopen the record, and for reconsideration of the Board's decision. The General Counsel and the Charging Party filed a joint opposition and DirecTV filed a reply. For the reasons set forth below, DirecTV's motion is denied.[1]

I.

The Respondent installs and services satellite television equipment for DirecTV. This dispute arose while the Respondent and the Charging Party were bargaining over their first collective-bargaining agreement. The Respondent submitted a scope-of-work proposal containing the following provision: "In the event [the Respondent] is engaged with respect to products or services other than ***those provided pursuant to its Home Service Provider agreement with DirecTV*** . . . , such work shall not be deemed bargaining unit work." *DirectSat*, 366 NLRB No. 40, slip op. at 4 (emphasis in original). The Charging Party requested to see the full HSP; the Respondent refused and provided only a few redacted excerpts. Id., slip op. at 4-5.

The Charging Party filed an unfair-labor-practice charge on May 20, 2016, and on September 23 the General Counsel issued a complaint alleging that the Respondent had violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the full, unredacted HSP to the Charging Party. On April 10, 2017, the case was submitted on a stipulated record to Administrative Law Judge Charles J. Muhl. Before the judge, the Respondent argued that the full HSP was irrelevant to the Union's function as collective-bargaining representative. The Respondent did not argue that it was privileged to withhold the full HSP on the ground that it contained confidential information. On July 20, 2017, the judge issued a decision and recommended Order finding the violation as alleged.

On March 20, 2018, the Board issued a Decision and Order affirming the judge's decision, although on different grounds. The Board found that the Respondent's proposal "effectively amounted to having the scope of bargaining-unit work defined by the HSP," and thus rendered "the entire HSP relevant to the negotiation, giving rise to a duty to provide the full, unredacted document to the Union." Id., slip op. at 2. The Board also noted that the Respondent "did not, at any point, object to disclosing the full HSP on grounds that doing so could reveal information of a confidential, proprietary, or trade-secret nature." Id., slip op. at 2 fn. 4. The Board thus ordered the Respondent to furnish the full, unredacted HSP to the Charging Party. Id., slip op. at 2.

II.

In its motion, DirecTV submits that it should be allowed to intervene now in this proceeding and that the Board should reopen the record and reconsider its decision because DirecTV did not have a chance to defend its interest in maintaining the HSP's confidentiality. DirecTV contends that the HSP contains non-public information that DirecTV views as confidential and proprietary. In support, DirecTV has supplied a declaration and an amended declaration by Assistant Vice President John Sellers. Specifically, Sellers represents that the following notice appears at the bottom of each page of the HSP:[2]

> Proprietary and Confidential
>
> This Agreement and Information contained therein is not for use or disclosure outside of AT&T, its Affiliates, and third party representatives, and Contractor except under written agreement by the contracting parties.[3]

According to Sellers, Section 3.14(d) of the HSP also contains the following provision:[4]

[1] The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. Member Emanuel is recused and took no part in the consideration of this case.

[2] Sellers Decl. ¶ 4.

[3] AT&T is DirecTV's parent company. We note that although the Respondent provided redacted copies of certain pages of the HSP to the Union, the "Proprietary and Confidential" notice did not appear on those copies.

[4] Sellers Decl. ¶ 5.

> If a receiving Party is required to provide Information of a disclosing Party to any court or government agency pursuant to a written court order, subpoena, regulatory demand, request under the National Labor Relations Act (an "NLRA Request"), or process of law, the receiving Party must, unless prohibited by applicable law, first provide the disclosing Party with prompt written notice of such requirement and reasonable cooperation to the disclosing Party should it seek protective arrangements for the production of such Information. The receiving Party will (i) take reasonable steps to limit any such provision of Information to the specific Information required by such court or agency, and (ii) continue to otherwise protect all Information disclosed in response to such order, subpoena, regulation, NLRA Request, or process of law.

Sellers also asserts that Section 3.36(c)(x) of the HSP makes it a non-curable breach of contract for the Respondent to fail to meet its obligations regarding the disclosure of confidential information.[5] Finally, Sellers represents that, in November or December 2016, DirecTV had discussions with the Respondent about the latter producing portions of the HSP to the Charging Party, which DirecTV believed arose in the context of the Respondent's negotiations to resolve a Board charge. According to Sellers, DirecTV did not hear anything further and assumed the matter had been resolved.[6]

III.

"Sec[tion] 10(b) of the Act expressly provides that intervention in unfair labor practice proceedings is discretionary with the Board, and not a matter of right." *Medi-Center of America*, 301 NLRB 680, 680 fn. 1 (1991). We find no reason to exercise our discretion to grant DirecTV intervention in the present case. Initially, we note the belated nature of DirecTV's effort to intervene. DirecTV filed its motion long after it knew or reasonably should have known that this proceeding could result, and indeed had resulted, in an order requiring full disclosure of the HSP. Its motion was filed over 8 months after the judge ruled that the HSP should be disclosed unredacted and in full. DirecTV argues that it did not learn the HSP might be disclosed in unredacted form until after the Board issued its Order. Yet DirecTV admits that, as early as November or December 2016, it discussed with the Respondent the possibility that the latter would produce information contained in the HSP in order to resolve a Board charge. And while DirecTV claims it assumed the matter had been resolved, it cannot and does not dispute that, months before this case was submitted to the judge, it was aware that a proceeding was underway that could affect its confidentiality interest in the HSP. Nor does it matter whether DirecTV's omission stemmed from the Respondent's failure to keep DirecTV apprised of developments in this case or from DirecTV's failure to exercise due diligence. The fact remains that DirecTV had ample notice and opportunity to seek intervention much earlier in this proceeding, but did not. Moreover, DirecTV cites no case in which the Board has allowed a party who had such notice to intervene after the Board had already issued its decision. We therefore deny DirecTV's motion to intervene as untimely.

Even if its motion were timely, DirecTV has not established that it was a necessary party to this case.[7] Assuming without deciding that DirecTV has a confidentiality interest in the HSP, the Respondent shared that interest and could have adequately defended that interest before the Board. Under the terms of the HSP, DirecTV and the Respondent share a community of interest in protecting the HSP's confidentiality. First, the "Proprietary and Confidential" notice prohibits disclosing the HSP outside of "AT&T, its Affiliates, and third party representatives, and [the Respondent]," thus treating the Respondent and DirecTV as equals with regard to its confidential nature. Second, the HSP requires the Respondent to defend its confidentiality in Board proceedings by notifying DirecTV of any disclosure request, cooperating with DirecTV in seeking protective arrangements, limiting any disclosure beyond what must be produced, and continuing otherwise to protect all disclosed information. And third, the HSP makes noncompliance with those requirements an incurable breach of contract. Together, those provisions establish that the Respondent's confidentiality interest in the HSP is commensurate with, if not defined by, DirecTV's.

In addition, the Respondent was fully capable of representing DirecTV's interests in this case. The HSP recognizes as much by delegating to the Respondent the responsibility of protecting DirecTV's confidentiality interests in Board proceedings. More importantly, the Respondent had available the same panoply of defenses as DirecTV would have had DirecTV intervened earlier in the proceeding. In these circumstances, the Respond-

[5] Sellers Decl. ¶ 6.
[6] Sellers Am. Decl. ¶ 7.

[7] Member Pearce would deny DirecTV's motion to intervene based solely on its unjustified delay in filing the motion. As explained above, DirecTV does not dispute that, months before this case was submitted to the judge, it was aware that a proceeding was underway that could result in an order requiring full disclosure of the HSP. DirecTV nevertheless did not seek to intervene until after the Board had issued its decision, and it has failed to provide an adequate explanation for its failure to intervene at an earlier stage.

ent's failure to assert confidentiality as a defense may be a matter for resolution between the Respondent and DirecTV, but it is not a basis for granting DirecTV intervention in this case.[8]

For all of these reasons, DirecTV's motion to intervene is denied. Consequently, DirecTV's requests to reopen the record and reconsider the Board's decision are moot.

Dated, Washington, D.C. July 25, 2018

_____
John F. Ring, Chairman

_____
Mark Gaston Pearce, Member

_____
Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[8] The Respondent did assert other defenses that as a practical matter would have addressed DirecTV's confidentiality concerns. Thus, DirecTV's confidentiality interest would have been entirely preserved if the Respondent had prevailed on its lack-of-relevance defense.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIRECTSAT USA, LLC Respondent, -and- INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 21, AFL-CIO, Union.	Case No. 13-CA-176621

RESPONDENT DIRECTSAT USA, LLC'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Pursuant to Section 102.46 of the National Labor Relations Board's ("NLRB" or the "Board") Rules and Regulations, Respondent DirectSat USA, LLC ("DirectSat" or "Respondent") submits this Brief in Support of its Exceptions to the July 20, 2017 Decision and Order ("Decision") of Administrative Law Judge ("ALJ") Charles J. Muhl. DirectSat excepts to the ALJ's finding that DirectSat violated Section 8(a)(5) and (1) of the National Labor Relations Act ("NLRA" or "Act"). (D. 11:23-24).[1]

[1] "(D. __)" references the Decision by page and line numbers.

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INTRODUCTION

DirectSat installs and services satellite television equipment for DirecTV pursuant to a Home Service Provider agreement ("HSP Agreement") with DirecTV. During the course of extensive negotiations with IBEW, Local 21 (the "Union"), the Union requested a full copy of the HSP Agreement in connection with two discrete issues. The Union first requested the HSP Agreement in March 2016 in response to a proposal by DirectSat regarding the definition of unit work, which made a specific reference to services provided by DirectSat to DirecTV pursuant to the HSP Agreement. DirectSat provided that portion of the HSP Agreement which described the services covered by the HSP Agreement. The Union never asserted the response was inadequate or otherwise articulated why the response provided was insufficient.

In May 2016, the Union again requested the HSP Agreement but asserted a new and different reason for its request. No longer asserting it needed the HSP Agreement in connection with any proposal advanced at the bargaining table, the Union now asserted it wanted to evaluate the extent of control of DirecTV on DirecSat. This request, however, was not presumptively relevant to the terms and conditions of employment of unit employees. The Union never provided any objective reason showing it had a reasonable basis to believe DirecTV controlled terms and conditions of employment of DirectSat employees. The relevance of the information was not apparent to DirectSat under the circumstances. Accordingly, DirectSat was not obligated to provide the full HSP Agreement.

The Union filed an unfair labor practice charge alleging that DirectSat violated the Act by refusing to provide it with a complete, unredacted copy of the HSP Agreement. Complaint issued on September 23, 2016. The Complaint alleges that the HSP Agreement requested by the Union is necessary and relevant to the Union's performance of its duties as the

exclusive-bargaining representative of bargaining unit employees, and DirectSat violated 8(a)(5) and (1) of the Act by refusing to provide the Union with a complete, unredacted copy of the HSP Agreement.

The ALJ rejected both theories proffered by the General Counsel to establish relevance of a complete, unredacted copy of the HSP Agreement. The ALJ rejected the General Counsel's argument that the Union needed to determine if DirectSat and DirecTV were joint employers for purposes of collective bargaining, finding relevance was not established because the Union did not establish an objective basis for believing DirectSat and DirecTV were joint employers at the time the Union made its information request. The ALJ also rejected the General Counsel's theory that relevance was established because the Union was entitled to the full HSP Agreement to verify the accuracy of DirectSat's claims concerning its relationship with DirecTV. However, instead of dismissing the Complaint, without any factual or legal support, the ALJ invented his own theory of relevance out of thin air to find a violation of the Act. In doing so, the ALJ misapplied Board law and denied DirectSat its due process right by finding a violation of the Act on a non-litigated theory. For these reasons, the ALJ's decision must be overturned.

The ALJ found that a complete, unredacted copy of the HSP Agreement is relevant because the Union is entitled to verify the Respondent's claim that it has provided all relevant information, and therefore DirectSat violated the Act by not providing the Union with a complete, unredacted copy of the HSP Agreement. The ALJ provided no applicable legal support for this theory. Moreover, the ALJ's theory is totally circular and illogical. Relevance must be established before the employer is obligated to produce information. Relevance is not established under the Act and Board law simply because the Union requested to see information

that is not presumptively relevant to establish relevance. The ALJ's theory puts the cart before the horse. The circularity is dizzying.

If the ALJ's decision is not reversed, it will upend the logical legal framework requiring that the relevance of requested information be established before the employer is obligated to produce it. Upholding the ALJ's decision would afford the Union the right to no-holds-barred access to employer information that is not presumptively relevant simply by stating it is entitled to information because the employer has asserted the requested information is not relevant. The Act and Board case law do not permit let alone contemplate this outcome.

Accordingly, DirectSat respectfully requests that the Board overturn the ALJ's decision and dismiss the General Counsel's complaint in its entirety, with prejudice

FACTS AND BACKGROUND[2]

Pursuant to the HSP Agreement, DirectSat services and installs satellite television equipment for DirecTV Inc. ("DirecTV"), a satellite television service provider. (JSF ¶ 7). On February 11, 2014, the Union was certified as the exclusive collective-bargaining representative of the following employees of Respondent ("Unit") for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time Installation/Service Technicians employed by the Employer at its facility located at 9951 W 190th St, Mokena, Illinois, 60448, but excluding all other employees, confidential employees, guards, and supervisors as defined in the Act.[3]

(JSF ¶¶ 12-13).

From September 4, 2014 through May 2016, the parties held approximately 24 bargaining sessions for a first contract and reached tentative agreements on many non-economic

[2] The Parties agreed to joint, stipulated facts. Citations to the Joint Stipulation of Facts are cited as (JSF ¶ __). Exhibits are cited as (JSF, Ex. __).

[3] The Mokena facility relocated to South Holland, Illinois in or around May 2015.

issues. (JSF ¶ 15). On November 12, 2014, Respondent presented its first "New Product Lines" proposal (Company Proposal No. 29) to the Union. The proposal addressed whether future products or services other than the installation and servicing of satellite television services would be deemed Unit work. (JSF ¶ 16; JSF Ex. 7). On December 10, 2014, the Union presented Respondent with a counterproposal to Company Proposal 29. (JSF ¶ 17; JSF Ex. 8). On September 15, 2015, Respondent presented the Union with its second New Product Lines proposal (Company Proposal No. 74). (JSF ¶ 18; JSF Ex. 9). On September 16, 2015, the Union presented Respondent with a counterproposal to Company Proposal No. 74. (JSF ¶ 19; JSF Ex. 10).

On November 4, 2015, Respondent presented the Union with Proposal No. 78, replacing Company Proposal No. 74, which contained the following language:

> In the event the Employer is engaged with respect to product or services other than those pursuant to its Home Service Provider agreement with DirecTV ....

(JSF ¶ 20; JSF Ex. 11).

In response to Respondent's Proposal No. 78, on November 23, 2015, the Union, through Business Representative Dave Webster ("Webster"), via email, made an information request to Respondent's attorney, Eric P. Simon ("Simon")[4] which provided in part:

> ... one of the company proposals references the HSP agreement with DTV. We'd like a copy of the agreement referenced in the proposal.

(JSF ¶ 21; JSF Ex. 12). On December 4, 2015, Respondent, through its Human Resources Director, Lauren Dudley ("Dudley"), responded to the Union via email and provided the three

[4] At all material times, Simon held the position of Respondent's outside legal counsel and chief spokesperson in connection with collective bargaining negotiations between Respondent and the Union. (JSF ¶ 11).

pages of the HSP Agreement which identified the services provided by DirectSat to DirecTV pursuant to the HSP Agreement. (JSF ¶ 22; JSF Ex. 13).

On February 16, 2016, Webster, sent an email to Simon, which stated:

> I have heard that AT&T has extended the DirecTV contract with DirectSat for another 3 years. With AT&T & DirectSat both Installing [sic] the DirecTV Dish we need to understand the relationship between AT&T & DirectSat and the shared work. Please send a copy of the current agreement between DirectSat & AT&T/DTV for use in bargaining.

(JSF ¶ 23; JSF Ex. 14).[5]

On February 20, 2016, Simon responded to Webster's February 16th email stating:

> We have no idea what you have heard or whom you have heard it from, but your "information" is erroneous. DirectSat has entered into no new agreements with AT&T. In early 2015, DirecTV extended its contract with DirectSat through 2018, but there has been nothing further.
>
> As to the substance of your request, you seem to assert is relevant because you believe DirecTV (I assume you refer to AT&T because of the recent acquisition of DirecTV by AT&T) and DirectSat have "shared" work. Again, you are mistaken. There is no "shared" work. As far as DirectSat is concerned, all of the work is DirecTV's. DirecTV currently has, and always has had, the right to contract as much or as little or none of its satellite TV system installation and service work to DirectSat as it, in its sole discretion, may decide. DirectSat only performs the work that DirecTV authorizes it to perform. DirectSat has never had an exclusive right to install/service DirecTV systems. Just as DirecTV had the ability to decide to whom it would contract with or if it would contract out installation/service work at all prior to the AT&T-DirecTV merger, DirecTV (even as a subsidiary of AT&T) continues to determine what and how much work to contract out. This is not an issue DirectSat has any control over or ever had any control over, and as such is not a mandatory subject of bargaining. Bargaining unit work has been and will continue to be the installation and service of DirecTV systems to the extent and

[5] On or about July 24, 2015, DirectTV was acquired by AT&T. (JSF ¶ 23, n.3).

> degree DirecTV authorizes DirectSat to perform such work. While Local 21 may have an issue with DirecTV's subcontracting of such work, it is not relevant to our negotiations.

(JSF ¶ 24; JSF Ex. 15).

Apparently abandoning the rationale for the production of the HSP Agreement set froth in his February 16, 2016 email to Simon, on March 18, 2016, Webster emailed Simon again requesting the HSP Agreement "particularly because of the reference [to the HSP Agreement] in the New Product Lines proposal." (JSF ¶ 25; JSF Ex. 16).

The Parties met for a bargaining session on March 22, 2016. (JSF ¶ 26). At the bargaining session Simon acknowledged the Union's March 18, 2016 request for a full copy of the HSP Agreement. Id. Simon stated that Respondent had already provided the Union with the relevant portions of the HSP Agreement. Id. Later at the same bargaining session the Union presented its counterproposal to Company Proposal No. 78 (New Product Lines). (Id.; JSF Ex. 17).

On May 19, 2016, at 9:31 a.m.., Webster sent an email to Simon stating:

> Mr. Simon,
>
> In connection with DirectSat negotiations I renew my request for a FULL copy of the HSP agreement between DirectSat and DirecTV/AT&T in additional to all current agreements with sub contractors [sic], to evaluate the extent of control of DirectSat by DirecTV/AT&T.

(JSF ¶ 29; JSF Ex. 20). On May 19, 2016, at 10:28 a.m. Simon responded:

> Dear Mr. Webster: We have already provided you with all relevant information regarding this request. We see no reason to supplement our response.

(JSF ¶ 30; JSF Ex. 21). On May 23, 2016, Simon faxed a letter to Webster explaining why Respondent was declining to provide a complete copy of the HSP agreement. (JSF ¶ 31; JSF Ex. 22). Simon wrote:

> The request for the full copy of the HSP agreement to evaluate DirecTV's control over DirectSat is irrelevant to negotiations between DirectSat and Local 21 regarding terms and conditions of employment of DirectSat employees. The 'extent of control' of DirecTV over DirectSat has no bearing on negotiations over wages, hours, or other terms and conditions of employment which are exclusively controlled by DirectSat. As previously explained to you at the table. DirecTV does not, and has no control over the wages paid to DirectSat employees or the metrics used to evaluate the performance of unit employees. These decisions are vested exclusively in DirectSat. For the 2+ years since Local 21 was certified as the representative of employees of DirectSat's Chicago South (now South Holland location), DirectSat has bargaining in good faith over the wages, hours and other working conditions of employment of unit employees. DirecTV has no role in these negotiations. DirectSat has never asserted that it cannot agree to a proposal on any issue because DirecTV might disapprove. Nor is the ability of DirectSat to enter into a collective bargaining agreement with Local 21 subject to approval by DirecTV.
>
> DirectSat has provided Local 21 with those portions of the contract with DirecTV which may have some relevance to our negotiations – the scope of work covered by the HSP agreement and the metrics used by DirecTV to evaluate the performance of DirectSat under the HSP agreement. (DirectSat did not object to providing this information on the basis that while DirectSat has fully authority to set performance metrics for unit technicians, DirectSat has stated that the metrics established by DirecTV to evaluate DirectSat help inform DirectSat in establishing performance metrics for technicians.)

JSF, Ex. 22. On May 24, 2016, the Parties met for a collective bargaining session at which the New Product Lines proposal was discussed. (JSF ¶ 33).

ARGUMENT

I. THE ALJ ERRED AS A MATTER OF LAW BY FINDING A VIOLATION OF THE ACT BECAUSE THERE WAS NOT A PROPER FINDING FIRST THAT A COMPLETE, UNREDACTED COPY OF THE HSP AGREEMENT IS RELEVANT

The ALJ initially stated that "[t]he only issue in dispute is the relevance of the [HSP] agreement to the Union's duties as the bargaining representative of the Respondent's technicians. (D. 6:33-34). The ALJ found that the Union failed to establish the relevance of the HSP Agreement on both of the theories proffered by the General Counsel. Specifically, the ALJ rejected the General Counsel's argument that the Union needed to determine if DirectSat and DirecTV were joint employers for purposes of collective bargaining, finding relevance was not established because the Union did not establish an objective basis for believing DirectSat and DirecTV were joint employers at the time the Union made its information request. (D. 7:24-34; 8:1-34). The ALJ also rejected the General Counsel's theory that relevance was established because the Union was entitled to the full HSP Agreement to verify the accuracy of DirectSat's claims concerning its relationship with DirecTV. (D. 9:4-36).

Despite any finding that a complete, unredacted copy of the HSP Agreement was relevant for any proffered reason, the ALJ then, uninvited, restated the disputed issue as "whether [DirectSat] unilaterally could decide that portions of the HSP agreement were relevant, only turn over those portions, and then refuse to provide the remainder of the agreement when the Union requested it." (D. 10:15-17). Then, having reframed the issue, the ALJ held that relevance was established "because the Union is entitled to verify the Respondent's claim that it has provided all portions of the HSP agreement relevant to the scope of unit work[,]" and therefore DirectSat violated the Act by not providing the Union with a complete, unredacted

copy of the HSP Agreement. (D. 11:11-15). This is nonsensical and unsupported as a matter of law.

None of the cases relied on by the ALJ stands for the proposition that relevance can be established because the Union is entitled to verify the employer's claim that it has provided all relevant information. (D. 10:15-32). Piggly Wiggly Midwest, LLC, 357 NLRB 2344 (2012) (where the employer sold two of its unionized grocery stores to franchisees, delayed providing the Union with the sales and franchise agreements the Union requested, the Board "agree[d] with the judge that the Union established the relevance of all of the information [requested] to its concern that the franchisees were alter egos of the Respondent[,]" and therefore the employer violated the Act by refusing to provide the information to the Union); Knappton Maritime Corp., 292 NLRB 236 (1988) (on a stipulated factual record the Board found the employer violated the Act by refusing to provide the Union with a complete copy of a purchase/sale agreement, where the Union established the relevancy of the sales agreement by reasonable, objective evidence of a belief of a joint employer relationship); Southern Oil Coal Co., 315 NLRB 835 (1994) (Board upheld ALJ's finding that Union's request for a complete copy of the purchase and sale agreement was relevant and necessary to its processing the subject employees' grievances concerning their contract right to panel for employment at Respondents other mining operations" and therefore refusal to provide it violated the Act.)

The ALJ also misapplied Olean General Hospital, 363 NLRB No. 62 (2015). (D. 10:34-42). In Olean General Hospital, the Board found that information "concerning a training program that affects employees' terms and conditions of employment is [] relevant to the Union's representational role" and "[t]he specific information requested--who the participating nurses would take orders from, and what education the nurses would receive to enable them to

participate--is, therefore, plainly relevant to the Union). Id., slip op. at 5. Unlike in Olean General Hospital, here the stipulated factual record established that DirectSat already provided the Union with concerning the scope of bargaining unit work covered by the HSP Agreement and the metrics used by DirecTV to evaluate the performance of DirectSat, and the Union never objected. JSF ¶ 31; JSF Ex. 22 ("DirectSat has provided Local 21 with those portions of the contract with DirecTV which may have some relevance to our negotiations – the scope of work covered by the HSP agreement and the metrics used by DirecTV to evaluate the performance of DirectSat under the HSP agreement.").[6] Therefore, Olean General Hospital does not apply.

None of the cases cited by the ALJ – and indeed no Board case of which Respondent is aware – has held that relevance can be established because Union is entitled to verify the employer's claim that it has provided all of the relevant information to assess an employer's assertion that certain information is not relevant to the bargaining process. Relevance must be established before the employer is obligated to produce information. Relevance is not established under the Act and Board law simply because the employer challenges the relevance of the requested information. To conclude otherwise is circular and

[6] The ALJ agreed with DirectSat that the Union never objected to DirectSat's responses to requests for the HSP Agreement as inadequate. (D. 11:5-6). Nevertheless, without any explanation or factual or legal support, the ALJ found that "[t]he Union's conclusion that the initial response was not sufficient obviously can be inferred from its subsequent requests for the agreement." (D. 11:4-10). The ALJ's inference is belied by the stipulated record conclusively establishing that the Union changed its stated reason for its request for the HSP Agreement over time. There is nothing in the record establishing an "inference" that DirectSat's response was inadequate. What is established by the stipulated record is that the Union could not and did not articulate a legitimate basis for its request for a complete, unredacted copy of the HSP Agreement. *Compare* (JSF ¶ 21; JSF Ex. 12), (JSF ¶ 23; JSF Ex. 14) and (JSF ¶ 25; JSF Ex. 16 and JSF ¶ 27; JSF Ex. 18). See, e.g., Time Inc., 02-CA-134835, 02-CA-139331, 02-CA-141216, 02-CA-142739, 02-CA-152002, 2016 NLRB LEXIS 574 (N.L.R.B. Aug. 9, 2016) (ALJ found the Employer did not violate 8(a)(5) of the Act where the Union changed its reason for wanting requested non-unit information now claiming the information was relevant for a different purpose, and the ALJ "doubt[ed] that [the new] asserted reason was genuine" where the Union, when pressed why it was seeking the information, stated "it was being sought to determine what chance the [Union] would have in being able to solicit nonunit employees to sign cards authorizing the Union to represent them [and therefore] the real reason was not for the purpose of bargaining; rather it was for the purpose of organizing."). Accordingly, there was no factual or legal basis for the ALJ to make such an inference.

illogical. Relevance must be established first. See, e.g., Piggly Wiggly Midwest, LLC, 357 NLRB at 2355 ("***once*** the burden of showing the relevance of nonunit information is satisfied, the duty to provide the information is the same as it is with presumptively relevant unit information.") (emphasis added).

If the ALJ's decision is not overturned, the Union would have unfettered access to information that is not presumptively relevant upon the employer's assertion that the requested information is not relevant. Accepting the ALJ's logic, an employer could never challenge the relevancy of requested information without waiving its objection. The Act does not permit let alone contemplate this outcome. Such an outcome is particularly inappropriate in the absence of any other allegation (let alone finding) of bad faith bargaining by DirectSat during the more than two years of bargaining. Such a finding is contrary to the purposes of the Act.

As a matter of law, because there was no finding in the first instance that a complete, unredacted copy of the HSP Agreement was relevant to the bargaining process, the ALJ erred in finding that DirectSat violated the Act by refusing to provide a complete, unredacted copy of the HSP Agreement.[7]

[7] After the parties submitted their briefs to the ALJ, Respondent filed a motion to strike portions of the Union's brief because offered factual assertions and conclusions based on evidence not contained in the stipulated factual record. The ALJ partially granted Respondent's motion to strike. (D. 12:4 n.23). However, the ALJ did not grant Respondent's motion to strike the section of the Union's brief entitled "How A Technician's Earnings Are Determined" because the ALJ found that the stipulated record did contain facts regarding the performance standards information requests. Respondent excepts to the ALJ's conclusion not to strike that section of the Union's brief. It was improper for the Union to offer facts beyond those in the stipulated record about the metrics used by DirecTV to evaluate DirectSat's performance to support its claim that the HSP Agreement was relevant (see Charging Party's Brief to the ALJ at 5-7). Although the ALJ stated performance standards had no bearing on the complaint allegation or the ALJ's conclusion that Respondent violated Section 8(a)(5) of the Act (D. 12:4 n.23), the ALJ's decision not to strike the portion of the Union's brief entitled "How A Technician's Earnings Are Determined" should be overturned because the Union offered facts outside the stipulated record.

II. DIRECTSAT WAS NOT AFFORDED DUE PROCESS BECAUSE THE ALJ INVENTED HIS OWN, UNLITIGATED THEORY OF THE CASE TO FIND A VIOLATION OF THE ACT

Despite the General Counsel's failure to satisfy its burden of proof regarding the relevancy of a complete, unredacted copy of the HSP Agreement, the ALJ invented a theory (invalid as a matter of law for all of the reasons above) to find a violation of the Act, and in doing so denied DirectSat of its due process rights. The fundamental elements of procedural due process are notice and an opportunity to be heard. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). Congress incorporated these notions of due process in the Administrative Procedure Act (APA). Under the APA, "persons entitled to notice of an agency hearing shall be timely informed of . . . the matters of fact and law asserted." 5 U.S.C. Section 554(b). To satisfy the requirements of due process, an administrative agency must give the party charged a clear statement of the theory on which the agency will proceed with the case. Bendix Corp. v. FTC, 450 F.2d 534, 542 (6th Cir. 1971). Additionally, "an agency may not change theories in midstream without giving respondents reasonable notice of the change." Id. (quoting Rodale Press v. FTC, 407 F.2d 1252, 1256 (D.C. Cir. 1968). Lamar Central Outdoor, 343 N.L.R.B. 261, 265, (2004).

In determining whether a respondent's due process rights were violated, the Board has considered the scope of the Complaint, and any representations by the General Counsel concerning the theory of violation, as well as the differences between the theory litigated and the judge's theory. See generally Sierra Bullets, LLC, 340 NLRB 242, 242-243 (2003) (violation based on broader theory improper and violates due process when General Counsel expressly litigated case on narrow theory); NYP Holdings, Inc., 353 N.L.R.B. 343 (2008) (where General Counsel argued that the employee was terminated for his union and protected concerted

activities, the ALJ reviewed and rejected each of the General Counsel's arguments, and then formulated an entirely different theory finding the employer's stated reason pretextual, the Board reversed, finding that the ALJ's theory was not part of the General Counsel's case, and did not afford the employer its due process rights or an opportunity to respond); see also Quickway Transportation, Inc., 354 NLRB No. 560 (2009) (finding the ALJ improperly held for Union in a discharge case when the General Counsel failed to advance the theory/reasons for the discharge relied upon by the ALJ). The same outcome is appropriate here.

Here, the ALJ analyzed each of the stated theories of relevance offered by the General Counsel and determined that each of those reasons failed to satisfy the General Counsel's burden. Remarkably, instead of dismissing the Complaint, the ALJ invented his own theory to find a violation. DirectSat did not have a full and fair opportunity to defend against the ALJ's theory of the case. Therefore, DirectSat was deprived of its due process rights, and the ALJ's decision should be overturned.[8]

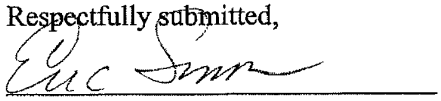
[8] The ALJ rationalized his theory of relevance ("The General Counsel did not advance the legal theory upon which I am finding a violation") by noting that there were no factual disputes because that the parties stipulated to the facts. (11:15 n.22). However, the Parties' agreement to a stipulated record says nothing of the ALJ's decision to find a violation of the Act on his own theory not litigated by the Parties. DirectSat was never afforded an opportunity to litigate the theory on which the ALJ found a violation of the Act before the ALJ. That was a violation of DirectSat's due process rights. Indeed, under the circumstances, DirectSat could not have been expected to respond to every possible theory that could ever be brought forth to find a violation.

CONCLUSION

For the foregoing reasons, the Board should overturn the ALJ's decision and dismiss the Complaint in its entirety with prejudice.

Dated: September 14, 2017

Respectfully submitted,

By 

Eric P. Simon
Douglas J. Klein
JACKSON LEWIS P.C.
666 Third Avenue
29th Floor
New York, NY 10017
(212) 545-4000
Counsel for Respondent

CERTIFICATE OF SERVICE

The undersigned affirms that on September 14, 2017, Respondent's Brief in Support of Exceptions to Administrative Law Judge Charles Muhl's Decision was filed with the National Labor Relations Board using the e-filing system at www.nlrb.gov, and that copies were served on the following individuals by electronic mail:

Elizabeth Cortez, Esq. Counsel for the General Counsel National Labor Relations Board, Region 13 219 S. Dearborn St., Suite 808 Chicago, IL 60604 Elizabeth.Cortez@nlrb.gov
Gilbert A. Cornfield, Esq. Cornfield and Feldman LLP 25 East Washington Street, Suite 1400 Chicago, IL 60602-1708 GCornfield@cornfieldandfeldman.com

JACKSON LEWIS P.C.
Attorneys for Respondent

Dated: September 14, 2017

By: _____

Douglas J. Klein
JACKSON LEWIS P.C.
666 Third Avenue, 29th Floor
New York, New York 10017
(212) 545-4020

United States Court of Appeals
for the District of Columbia Circuit

CERTIFICATE OF SERVICE

I, Julian Hadiz, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by Jackson Lewis P.C., Attorneys for Petitioner to print this document. I am an employee of Counsel Press.

On **January 18, 2019**, Counsel for Petitioner has authorized me to electronically file the foregoing **Deferred Joint Appendix** with the Clerk of Court using the CM/ECF System, which will serve, via e-mail notice of such filing, to any of the following counsel registered as CM/ECF users:

PETER B. ROBB
General Counsel
JOHN W. KYLE
Deputy General Counsel
LINDA DREEBEN
Deputy Associate General Counsel
USHA DHEENAN
Supervisory Attorney
GREGOIRE SAUTER
Attorney
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, DC 20570
Tel.: (202) 273-2948
Fax: (202) 273-1714
Attorneys for Respondent

ARTHUR TRACY CARTER
ARRISSA K. MEYER
LITTLER MENDELSON, P.C.
2001 Ross Avenue,
Suite 1500, Lock Box 116
Dallas, Texas 75201

STEPHEN J. SFERRA
LITTLER MENDELSON, P.C.
1100 Superior Avenue, 20th Floor
Cleveland, Ohio 44114

A. JOHN HARPER III
LITTLER MENDELSON, P.C.
1301 McKinney Street, Suite 1900
Houston, Texas 77010
Attorneys for Petitioner
DirectTV, LLC

Unless otherwise noted,7 paper copies have been filed with the Court on the same date via Express Mail.

January 18, 2019

/s/ Julian Hadiz
Counsel Press